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IN THE

Supreme Court of the United States

October Term, 1943

No. 570

BLACK

vs.

PIONEER

and

TAMPA INTER-

PET

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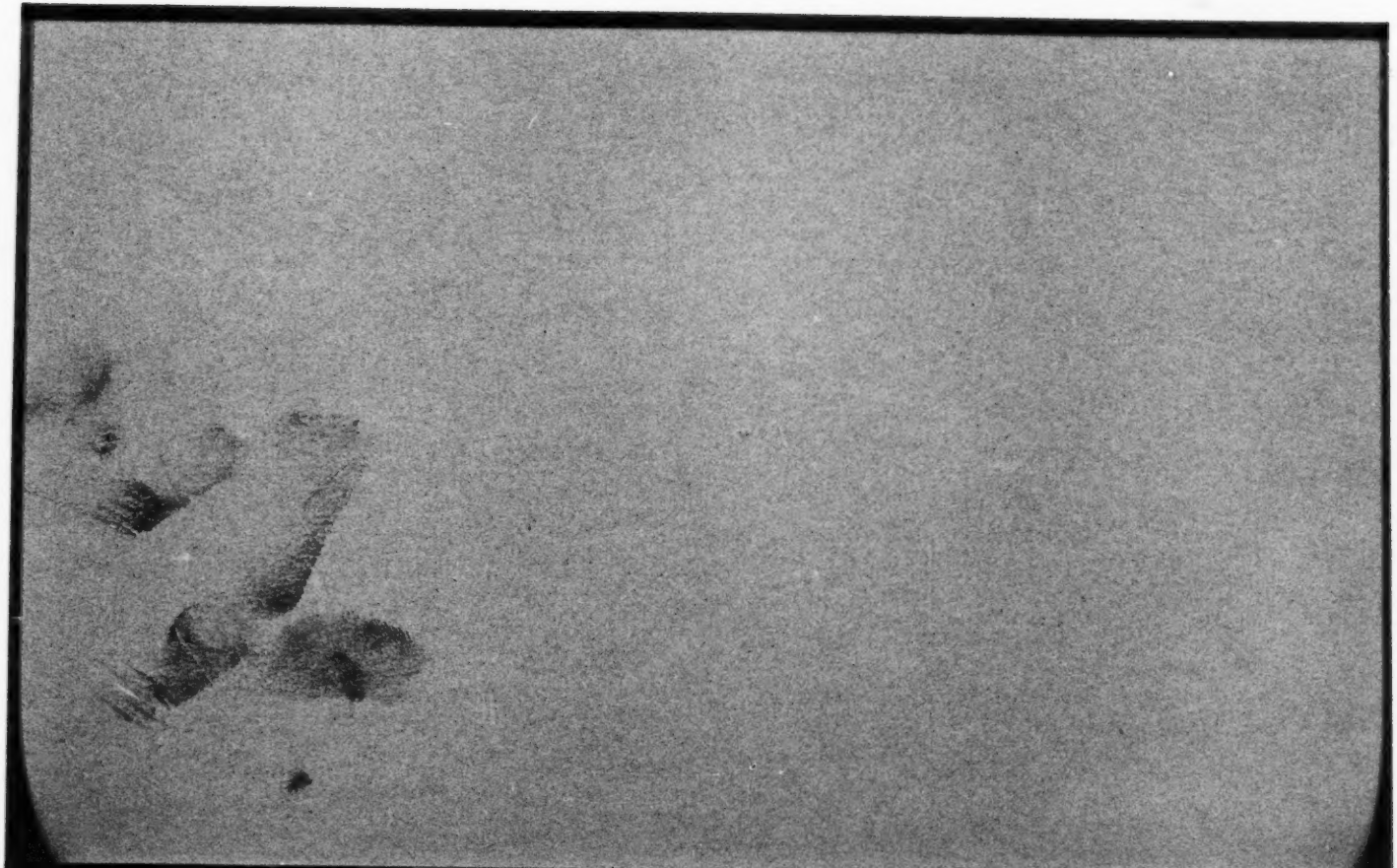
Hunt,



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IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. ....

BLACK DIAMOND LINES, INC.,
Petitioner
(Respondent-Appellant below),

against

PIONEER IMPORT CORPORATION,
Respondent
(Libellant-Appellee below),

and

TAMPA INTER-OCEAN STEAMSHIP COMPANY,
Respondent
(Claimant-Appellant-Appellee below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner herein prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review a decree of that Court entered December 8, 1943 (R. 979), affirming an inter-

locutory decree of the United States District Court for the Southern District of New York in favor of the respondent, Pioneer Import Corporation (libellant in the District Court).

Jurisdiction.

The date of the decree of the Circuit Court of Appeals to be reviewed is December 8, 1943 (R. 979). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. § 347(a)) and under General Rule 38 of this Court, Section 5, subdivision (b).

Statement.

This is a suit by the respondent, Pioneer Import Corporation (hereafter called "Pioneer") against the steamer Lafcomo and the petitioner, the charterer of the vessel, to recover for damage to a shipment of 1847 cases and 20 bundles of four cases each of lily of the valley pips (hereafter called "pips"), which were transported by the Lafcomo from Rotterdam, The Netherlands, to New York, in November-December, 1939 (R. 6-9). The pip of the lily of the valley is the part which contains the flower bud and the leaves and it is attached to rather long fibrous roots (Patterson, R. 91). The Lafcomo was claimed by her owner, the respondent, Tampa Inter-Ocean Steamship Company, which will hereafter be called "Tampa Inter-Ocean."

The respondent, Pioneer, is a New York corporation, but the United States Alien Property Custodian has vested 85.71% of its capital stock (R. 43). In the year 1939 it became the exclusive channel through which pips from Germany could be acquired and brought into the United States (G. Patterson, R. 89, 90; Niemann, R. 360).

These pips were grown in Wittenberg, Germany, were packed in moist sphagnum moss in wooden cases in October and November, 1939, and were transported by rail and motor truck from Germany to Rotterdam in the latter part of November (Philippo, Dir. Ints. 6-9; R. 592-595; Van Noort, Cross Int. 7(d) and (e); R. 611).

The pips originally were booked in the latter half of November for carriage under refrigeration on the steamer Statendam of Holland-America Line. About that time, however, the British Government announced that an embargo on goods of German origin would be imposed within a few days and as a result the Holland-America Line cancelled the booking (Van Noort, Cross Ints. 2, 5; R. 609, 610).

The universal practice for a great many years has been to transport pips under refrigeration. That is the only safe way to carry them. The reason is that refrigeration keeps the pips dormant or "asleep" (Langeler, R. 477, 479; Kuer, R. 504). Otherwise they will sprout. Pips also must have a continuous circulation of fresh air around them, even under refrigeration, to prevent sprouting. The cases in which pips are carried are fitted with cleats on both sides to provide a space for air circulation when they are set down. On occasions a warehouse employee has set a case on its end, which has no cleats, or placed it against the wall, thus shutting off the air circulation in part, with the result that the pips, according to Pioneer's witnesses, have sprouted as much as four or five inches in a refrigerated warehouse (E. Patterson, R. 161-163, 166, 167; H. Patterson, R. 176, 177, 183, 184).

When the Holland-America Line refused to carry the shipment there were no other vessels with refrigerated compartments available at Rotterdam. Therefore Pioneer, in order to get its pips out of Holland before the imposition of the British embargo, was obliged to ship them on some

vessel without refrigeration. The respondent operated a steamship line to Rotterdam and had the steamer Lafcomo under charter from the respondent, Tampa Inter-Ocean, under the usual Government form of time charter (Cl. Ex. D; R. 900), and the Lafcomo was at Rotterdam in November.

Pioneer, through its forwarding agents at Rotterdam, P. A. Van Es & Co. (hereafter called "Van Es"), booked the shipment on November 25, 1939, with the petitioner's Rotterdam agents, Van Nievelt Goudriaan & Co. (hereafter called "Van Nievelt"), for carriage on the Lafcomo. The booking arrangements were made over the telephone by A. J. H. Van Noort, acting for Van Es, and Willem Kruyne, an employee of Van Nievelt. The Lafcomo, a well deck ship of the Hog Island type, had no refrigeration compartments, as Pioneer's agents knew (Van Noort, Cross Int. 28; R. 617, 618).

Van Noort, in the first conversation with Kruyne, instructed that the pips be stowed on the ship's fore deck in order to insure maximum ventilation and that they be covered with tarpaulins for protection from the elements. Kruyne then telephoned H. Hollaar, the petitioner's European port captain, whose office was at the pier, and advised Hollaar of the shipper's request. Hollaar was the one who had charge of laying out the cargo and knew what spaces were available. The petitioner had had extensive experience in the carriage of Dutch flower bulbs, but had never carried pips before as it had no refrigerated ships (Hollaar, Dir. Ints. 5, 22; R. 652, 653, 661, 662).

Hollaar was greatly surprised that the shipper should want lily of the valley pips stowed on deck and told Kruyne that there was space available in the squares of the hatches in the Nos. 1 and 2 tween decks and asked him to offer that space to the shipper. Good ventilation would have been secured in these spaces, and, besides, the pips would have

been protected there. Hollaar emphasized the necessity of ventilating the pips and pointed out that they would have no ventilation whatever if surrounded by tarpaulins. He said that tarpaulins furthermore would afford no guarantee of protection as they could not be expected to hold up under the pounding of the seas. He said, in short, that it was an utter impossibility to fulfill the shipper's request that the pips be ventilated and at the same time be protected from the elements with tarpaulins. He told Kruyne to discuss the matter further with Van Noort along the lines above indicated (Kruyne, Dir. Ints. 9-17; R. 692-698; Hollaar, Dir. Ints. 13-23; R. 656-664; Cross Int. 3; R. 673-675).

Kruyne thereupon telephoned Van Noort, offered him the under-deck stowage and discussed with him the advantages and disadvantages of using tarpaulins and informed him that if the cargo was to be stowed on deck it could not be given both the ventilation required and protection from the elements. Van Noort, according to Kruyne, still insisted that the pips be stowed on the fore deck, but withdrew his request for tarpaulins. Kruyne immediately so advised Hollaar (Kruyne, Dir. Ints. 12, 16-26; R. 693, 694, 696-703; Hollaar, Dir. Ints. 24, 25; R. 664; Van Someren, Dir. Ints. 2-13; R. 725-731). Van Noort admitted that he had been offered under-deck stowage and had declined it, but denied that he withdrew the request for tarpaulins (Cross Ints. 29, 30; R. 618).

Following the booking, 1760 cases of pips were delivered alongside of the Lafcomo by lighter and 167 cases were delivered at the pier by truck on the afternoon of November 25th. They were loaded on the afternoon and evening of November 26th.

Clause 8 of the charter (Cl. Ex. D; R. 900) provided in part as follows:

> "* * * Charterers are to load, stow and trim the cargo at their expense under the supervision of

> the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts."

The charter also contained the following clause:

> "26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account."

The loading of the cargo was done by a Rotterdam stevedoring concern, N. V. Thomsen's Havenbedrijf, who were hired and paid by the petitioner's Rotterdam agents (Hollaar, Dir. Int. 27; R. 665).

Hollaar planned the loading and stowage of the cargo in co-operation with the master and officers of the Lafcomo. He informed them that Pioneer wanted the pips stowed on the fore deck, discussed all details of the stowage with them, and agreed with the master as to the manner of stowing the cargo (Dir. Ints. 28, 33; R. 665, 666, 668; Cross Ints. 7, 13-A; R. 676, 677, 683, 684).

The pips were stowed to a height of about six feet on the forward well deck, on both sides of the No. 1 and No. 2 hatches. They occupied most of the deck except for spaces running athwartships between the hatches and between the No. 2 hatch and the bridge deck bulkhead. A vertical space of about four inches was left between the outside cases and the bulwarks for drainage (Findings No. 24 and 25; R. 934).

The petitioner supplied the rope nets which were used in securing the cargo but the remaining cargo gear was furnished by the ship (Hollaar, Dir. Int. 13(A); R. 683, 684; Wood, R. 563). The stevedores laid down the dunnage on the deck, installed fence boards at the bulwarks, loaded the cargo, and did the actual placing of the cases in the stow (Haegens, Dir. Ints. 6-8; R. 782, 783; Anderson, Dir. Ints. 6-9; R. 787-789). Wood, the ship's chief

officer, together with the captain and the second officer, were present during the loading and stowage of the cargo. The chief officer had final supervision of the stowage. He stated that he was there to see that the cargo was stowed so that it would not be damaged or make the ship unseaworthy and that if there was anything about the stowage of which he did not approve he would order the stevedores to change it (R. 562, 573-577). The cargo was lashed and secured by the ship's crew under the supervision of the master and chief officer (R. 573, 576). Hollaar exercised a general supervision over the loading and stowage, but, independently of him, the final supervision was in the hands of the master and officers of the ship (Cross Int. 13; R. 683-685; Wood, R. 577). Kruyne having informed Hollaar that the shipper's representative had revoked his demand for tarpaulins, Hollaar so advised the ship's officers and the stevedores and the pips were not covered (Cross Int. 13(E); R. 683, 684).

The bill of lading, which was drawn up by Pioneer's agents, Van Es, was dated November 26, 1939. It contained a stamped clause reading "Shipped on deck at Shippers' risk" and made no mention of tarpaulins or covering of any sort (Lib. Ex. 7; R. 878; Finding No. 26; R. 934, 935).

The Lafcomo completed her loading on November 27th and shifted into the stream on November 28th, awaiting favorable weather. She got away on November 29th and arrived in New York on December 16th (Finding No. 33; R. 937, 938).

During the voyage the Lafcomo encountered gales and heavy seas, with wind forces up to force 8, and on one occasion force 9, Beaufort Scale. Much water was shipped over her forward deck. On December 9th an unusually heavy sea came aboard and tore loose the starboard ladder to the lower bridge and broke up a few of the cases. Some sacks of napthalene were washed away from the after deck but no cases of pips shifted or were lost overboard (Find-

ing No. 33; R. 937, 938). The voyage was an unusually warm one for that time of year, with temperatures in the fifties day after day. The temperatures ranged from a minimum of 33 degrees to a maximum of 66 degrees, with an average of about 52 degrees F. (R. 28-33).

On discharge the pips were found to be wet and it was ascertained that the water which wet them was salt water. Elaborate tests were made by the Boyce-Thompson Institute in Yonkers, N. Y., at the request of H. Patterson & Sons, prospective buyers of some of the pips, to determine whether the salt water had damaged them. The Pattersons also planted many of the pips for the same purpose. The tests showed that salt water was damaging to pips and it was decided that it would be commercially unprofitable to grow and market the pips, so what remained of the shipment was destroyed. Pioneer claims damages in excess of $80,000.

Decisions Below.

The opinion of the District Court is printed on pages 918-928 of the record and is reported in 49 Fed. Supp. 559, under the title of *Pioneer Import Corporation* v. *The Lafcomo, et al.* The Court's findings of fact and conclusions of law are printed at pages 928-946 of the record. The opinion of the Circuit Court of Appeals is printed at pages 976-978 of the record. It has not yet been reported.

The District Court found that the shipper did not withdraw its request that the goods be covered with tarpaulins and that the parties agreed that the cases should be stowed on the ship's forward deck and properly covered by tarpaulins. The testimony on this disputed point was taken under a commission issued to the United States Consul in Rotterdam. The Court held that the cargo should have been stowed on the tops of the Nos. 1 and 2 hatches instead of on the deck plating between the hatches and the bul-

warks and that the cargo was stowed so as to block off part of the freeing ports, mooring rings and scuppers in the bulwarks, thus rendering the Lafcomo unseaworthy with respect to the carriage of the cargo. The Court held further that the stowing of the cargo, although done by the petitioner's agents and stevedores, was under the joint supervision of the ship's master and chief officer. It found that the stowage was laid out under the supervision of chief officer Wood and that some officer of the Lafcomo, principally the chief officer, was present continuously during the loading and stowage and that the master and chief officer supervised the stowage, together with Hollaar (Finding No. 23; R. 933, 934; Findings Nos. 63 and 64; R. 944). The Court held that the petitioner and the respondent, Tampa Inter-Ocean, were jointly negligent in the stowage of the cargo and held them jointly and severally liable to Pioneer. It then held that the petitioner, as between it and Tampa Inter-Ocean, must bear the whole loss because Hollaar's statement to the ship's officers, that the shipper had revoked the demand for tarpaulins, was unfounded. An interlocutory decree was awarded to Pioneer (Opinion, R. 918-928).

The Circuit Court of Appeals held that the District Court's findings were sustained by the evidence; that the shipper accepted the risk of losses from carriage on deck only so far as they occurred under proper stowage; that the Lafcomo was unseaworthy with respect to the carriage of the pips; and that the petitioner and the vessel were both liable for the damage. The Court held further that Pioneer was not at fault in insisting on deck stowage and hence that there was no basis for the application of the rule of divided damages in tort cases. It considered the case to be governed in part by this Court's decision in *Schnell* v. *The Vallescura,* 293 U. S. 296, which it cited after saying that the petitioner had not been able to prove what damage the pips would have sustained "if proper stowage had been made." It held finally that since, as the

District Court found, Pioneer's demand for tarpaulins was never withdrawn, Hollaar's statement to the master of the Lafcomo "that tarpaulins were not needed" was a "gross misrepresentation of fact" and that therefore the petitioner should be held for the entire damage as against Tampa Inter-Ocean. The decree accordingly was affirmed (R. 976-978).

Questions Presented.

1. Where a steamer has been chartered under the Government form of time charter, which contains a clause providing that the charterer is to load, stow and trim the cargo at its expense, under the supervision of the captain, and the ship-owner and the charterer have participated jointly in the stowage of a shipment of lily of the valley pips on the deck of the chartered ship and have been found jointly negligent with respect to such stowage and jointly and severally liable for the damage to the cargo, does the charterer have to bear the entire damage as against the ship-owner, or vice versa, or should the loss be divided equally between them?

2. If such deck cargo, stowed under the joint supervision of representatives of the ship-owner and the charterer, is placed so close to the ship's bulwarks as partially to obstruct and block off the drainage apertures therein, thereby rendering the ship unseaworthy for the carriage of the cargo, who, as between the ship-owner and charterer, has the primary responsibility for such stowage, or are they equally responsible therefor?

3. If such deck cargo, stowed under the joint supervision of representatives of the ship-owner and charterer, is stowed on the plating of the forward deck instead of the tops of the hatches and sustains damage by sea water, does the primary responsibility for such stowage rest on the ship-owner or the charterer, as between them, or are both equally responsible?

4. If the charterer makes an agreement with the shipper that such deck cargo is to be covered with tarpaulins, and it is not covered, is the final responsibility for not covering the goods, as between ship-owner and charterer, that of the charterer or the ship-owner, or are both equally responsible?

5. If the chartered ship was rendered unseaworthy with respect to the carriage of the pips because of improper stowage participated in jointly by the charterer and the ship-owner, does the ship-owner or the charterer, as between them, bear the cargo-owner's entire loss, or should each bear one-half of the loss?

6. If the charterer's representative informs the ship's officers that the shipper has withdrawn its original demand that the pips be covered with tarpaulins and such statement proves to be unfounded, should the charterer, because of such statement, be required to bear the entire damage to the cargo as against the ship-owner, where two of the three grounds on which the Court's finding of joint negligence is based, namely, stowage of the cargo on the deck plating and in too close proximity to the bulwarks, have no relation to tarpaulins?

7. Does a shipper of lily of the valley pips, who rejects the carrier's tender of under-deck stowage and insists that the pips be stowed on the ship's fore-deck on a winter north Atlantic westbound voyage, thereby assume the risk of damage to the cargo solely through wetting by sea water which the vessel ships during the course of the voyage, irrespective of any negligence found chargeable to the carrier in the stowage?

8. Where the carrier is found at fault in the stowage, should the shipper nevertheless be required to bear half of

the loss, under the circumstances stated in the preceding question?

9. Does the rule stated by the Court below, that the shipper accepts the risk of losses from the carriage of cargo on deck only so far as they occur under proper stowage, extend to and include damage to deck cargo arising solely through the wetting of the cargo by sea water which the vessel ships during the voyage?

10. Was proof of an alleged oral agreement to cover the goods with tarpaulins, antedating the bill of lading and not incorporated therein, permissible in view of this Court's decisions in *The Delaware,* 14 Wall. 579, 603, 604, and *The Thames,* 14 Wall. 98, 105.

11. Was the lower Court correct in upholding the District Court's finding that the shipper and the petitioner made an agreement that the goods be covered with tarpaulins?

12. Was the lower Court correct in holding that the District Court's finding of negligence in the stowage of the pips was justified?

13. Did the carrier violate any duty to the shipper in stowing the pips on the ship's fore-deck, between the bulwarks and the hatches, when the shipper designated the fore-deck as the place of stowage?

14. Does the impossibility of showing the amount of damage which the pips would have sustained, if they had been covered with tarpaulins and stowed on the hatches, bring this case within *Schnell* v. *The Vallescura,* 293 U. S. 296?

Specifications of Error to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that Pioneer's entire loss must be borne by the petitioner, as between it and the respondent, Tampa Inter-Ocean.

2. In failing to hold that Pioneer's entire loss should, as between the petitioner and the respondent, Tampa Inter-Ocean, be borne by the latter.

3. In failing to hold in any event that inasmuch as the stowage of the pips was a joint operation by the petitioner and the respondent, Tampa Inter-Ocean, and the damage was found due to their joint negligence, the loss should be divided equally between them.

4. In holding the petitioner liable for the entire damage, as between it and the respondent, Tampa Inter-Ocean, because of the statement of the petitioner's representative to the ship's officers that the shipper had revoked its demand for tarpaulins, which was held to be unfounded.

5. In failing to hold that the respondent Pioneer, by reason of its refusal of the petitioner's offer of stowage for the pips under deck and its insistence that they be stowed on the ship's fore-deck, assumed the risk of any damage they might sustain through wetting by sea water shipped by the vessel during the voyage.

6. In failing to hold that the risk of wetting by sea water is inherent in the stowage of cargo on deck and as such is accepted by the shipper at all events when he agrees that his goods shall be carried on deck.

7. In failing to hold, in any case, that the damages should be divided equally between Pioneer and the carrier on the ground that Pioneer was guilty of fault in rejecting the petitioner's offer of underdeck stowage and insisting on stowage on deck.

8. In permitting proof of an alleged oral agreement, not incorporated in the bill of lading subsequently issued, that the pips should be covered with tarpaulins.

9. In failing to hold that the rights of the parties were measured by the bill of lading which was issued for the goods.

10. In affirming the District Court's finding that the petitioner and the shipper agreed that the pips should be covered with tarpaulins.

11. In affirming the District Court's conclusions that the pips were negligently stowed and that Pioneer's loss resulted therefrom.

12. In holding that under this Court's decision in *Schnell* v. *The Vallescura*, 293 U. S. 296, the carrier is liable for the loss because it was impossible to show the amount of damage which the pips would have sustained had they been stowed on top of the hatches and covered with tarpaulins.

Reasons for Granting the Writ.

1. The Court below, in holding that the petitioner, as between it and Tampa Inter-Ocean, must bear Pioneer's entire loss, where the stowage of the pips was held to be a joint operation by the charterer and the ship-owner and the damage was found to be due to their joint negligence, has rendered a decision which is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *The Nidarholm*, 34 Fed. (2d) 442; 36 Fed. (2d) 227.

2. The Court below, in imposing liability on the petitioner, as against Tampa Inter-Ocean, for Pioneer's entire loss, although the Lafcomo was held to be unseaworthy with respect to the carriage of the pips, has decided a federal question in a way which is probably in conflict with the decision of this Court in *Oxford Paper Co.* v. *The Nidarholm*, 282 U. S. 681.

3. The Court below, in failing to hold Tampa Inter-Ocean liable for the entire loss, as between it and the petitioner, has rendered a decision which is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Seguranca*, 250 Fed. 19.

4. The Court below, in holding that Pioneer, when it refused the petitioner's tender of underdeck stowage and insisted that its goods be carried on deck, did not assume the risk of damage to its cargo solely through wetting by sea water which the vessel shipped during the voyage, has rendered a decision which is in probable conflict with the decisions of this Court in *Lawrence* v. *Minturn*, 17 How. 100, and *The Delaware*, 14 Wall. 579, 605, and with the decision of the Circuit Court of Appeals for the Ninth Circuit in *The Carrisso*, 30 Fed. (2d) 279.

5. The Court below, in holding that the risk of contact with water from seas shipped by the vessel during the voyage is not a risk inherent in the stowage of cargo on deck, which is assumed by a shipper who contracts with a carrier for deck stowage at the shipper's risk, has decided an important question of federal law which has not been, but should be, settled by this Court.

6. The Court below, in refusing to hold Pioneer to half damages in any event because of its insistence on deck stowage when it could have had under deck stowage, has rendered a decision which is in probable conflict with the

decision of this Court in *The Max Morris* v. *Curry,* 137 U. S. 1 (11 Sup. Ct. Rep. 29), and also with the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Georgian,* 76 Fed. (2d) 550, affirming 4 Fed. Supp. 718, and the decision in *Snow et al.* v. *Carruth et al.,* 22 Fed. Cases, 724 (No. 13, 144).

7. The Court below, in enforcing against the petitioner on oral agreement with the shipper that the goods should be covered with tarpaulins, allegedly made before the execution of the bill of lading, and not incorporated therein, has decided a federal question in a way probably in conflict with the decisions of this Court in *The Delaware,* 14 Wall. 579, 603, 604, and *The Thames,* 14 Wall. 98, 105.

8. The decision below is erroneous in upholding the District Court's finding that a prior oral agreement was made by the petitioner with the shipper to cover the pips with tarpaulins.

9. The decision below is erroneous in holding that the stowage of the pips was negligent and was the proximate cause of Pioneer's loss.

10. The Court below, in holding the petitioner liable under *Schnell* v. *The Vallescura,* 293 U. S. 296, because of the petitioner's inability to prove what the damage to the goods would have been had they been stowed on top of the hatches and covered with tarpaulins, has decided an important question of federal law which has not been, but should be, settled by this Court.

Wherefore, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari, directing the United States Circuit Court of Ap-

peals for the Second Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the decree of the Circuit Court of Appeals may be reversed, and that your petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated, December 24, 1943.

BLACK DIAMOND LINES, INC.,
Petitioner,

By JOHN W. CRANDALL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

Summary of Argument.

The petitioner's first three points deal with the question of liability for the damage, as between ship-owner and charterer (pp. 19-30). The fourth and fifth points discuss the subject of assumption of risk by the shipper and the half damage rule in admiralty (pp. 31-35). The sixth point is concerned with the parol evidence rule, with particular reference to bills of lading (p. 36). The seventh point challenges the finding that an agreement to use tarpaulins was made (pp. 37, 38). The eighth point questions the holding as to negligence and the application of *Schnell* v. *The Vallescura* (pp. 39-41) and the last point emphasizes the general importance of the questions presented (pp. 42, 43).

POINT I.

The decision below, in holding the petitioner, as against Tampa Inter-Ocean, liable for all the damage, when both participated in the stowage of the cargo, is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *The Nidarholm*.

The District Court held that the petitioner's agents, through Hollaar, port captain at Rotterdam, and their stevedore, loaded this cargo and stowed it under the joint supervision of the ship's master and chief officer. It held further that the petitioner and Tampa Inter-Ocean were jointly

negligent in stowing the cargo and were jointly and severally liable to Pioneer for the damage to the cargo (R. 926, 927; see also Conclusion of Law No. IX, R. 946).

Finding of Fact No. 23 (R. 933, 934) reads in part as follows: "The stowage was laid out under the supervision of the Lafcomo's chief officer, Captain Wood."

Finding No. 59 (R. 943, 944) states that Hollaar, the petitioner's port captain, planned the loading and stowage of the cargo in co-operation with the master of the Lafcomo and his officers.

Finding No. 60 (R. 944) states that Hollaar advised the master and officers that the pips were to be stowed on the ship's fore deck and were not to be covered with tarpaulins; that he discussed with them all the details of the stowage and agreed with the master as to the manner of stowing the cargo.

Finding No. 64 (R. 944) states that the master and chief officer of the Lafcomo supervised the stowage of the cargo, together with the petitioner's port captain.

The Court's conclusions of law as to negligence were based upon three separate grounds; first, because the pips were stowed on the flat of the deck so close to the bulwarks as to obstruct some of the drainage apertures therein; second, because they were not covered with tarpaulins; and, third, because they were not stowed on the top of the Nos. 1 and 2 hatches (Conclusions Nos. VI, VII and VIII; R. 945, 946).

The Circuit Court of Appeals sustained all the foregoing findings and conclusions (R. 976-978).

Thus, although the ship-owner and the charterer were found to have been joint participants in the stowage and

to be jointly negligent therein, the entire loss was imposed upon the charterer (petitioner). This case therefore is in direct conflict with *The Nidarholm*, 34 Fed. (2d) 442 (C. C. A. 1); opinion on rehearing, 36 Fed. (2d) 227.

In *The Nidarholm* the charter was in the Government time form, as here, and provided that the charterer was to load, stow and trim the cargo at its expense, under the supervision of the captain. The charterer constructed a crib on the deck and piled up logs of pulpwood to a height of 17 feet. When the ship left her dock she had a starboard list, which later shifted to a port list. Shortly afterward the stanchions on both sides broke and the deck load above the rail fell into the sea. The charterer thereupon sued the ship to recover damages for the loss of the cargo.

The District Court, in *The Nidarholm*, 26 Fed. (2d) 92 (D. C. Me.), held for the charterer on the ground that the master supervised the loading and securing of the cargo and that the loss was due to the overloading of the ship with the deck cargo improperly stowed under the master's supervision.

The Circuit Court of Appeals held that the charterer's agent knew as well as the master that the cribbing would have to be strong enough to withstand the stresses produced by the vessel's heeling or rolling and in conclusion said (p. 443):

> "The construction of the cribbing was, taking the facts most favorably to the charterer, a joint undertaking carried out by the charterer and the vessel; for the failure of it each was at fault, and the loss should be divided."

This Court granted a writ of certiorari on the charterer's petition and affirmed the Circuit Court's decision.

Oxford Paper Co. v. *The Nidarholm*, 282 U. S. 681. Since the ship-owner did not ask for certiorari the Court was not called upon to decide the exact point now presented. But it was squarely before the Circuit Court.

There is nothing in the present record which makes the two decisions reconcilable. Clearly Hollaar's statement that the shipper's demand for tarpaulins had been withdrawn, even if unfounded, constitutes no adequate ground for imposing the entire loss on the petitioner. If the stowage issue had narrowed down to the simple point of using or not using tarpaulins the situation might be different. But it did not turn upon any such narrow question. As we have seen (*supra*, p. 20), the ship-owner and charterer were found jointly negligent on *three* grounds. And two of these three grounds were not concerned with the tarpaulin issue at all.

The District Court's holding (R. 920-922) that the carrier was at fault in failing to stow the pips on the tops of the hatches and in stowing them on the deck between the hatches and the bulwarks instead, had nothing to do with tarpaulins. Pioneer's own witnesses conceded that tarpaulins would not have been any protection for the pips when stowed on the deck plating. Claridge said that even if they had been surrounded by three or four thicknesses of tarpaulins they still would have been "thoroughly soaked" (R. 858, 859; see also Lynner, R. 256, 257). The carrier's experts said that tarpaulins would have been of no use in either place (Anderson, R. 413; Pilcher, R. 450, 451; Cocks, R. 357; Hollaar, Dir. Int. 19; R. 659, 660; Wood, R. 565, 566).

The Court's further holding (R. 920-922) that the goods were stowed so close to the bulwarks as to block off the drainage outlets partially, thereby preventing water from

clearing the decks readily and rendering the ship unseaworthy for the carriage of the pips, had no conceivable relation to tarpaulins. If the cases had been entirely enveloped in tarpaulins obviously the outlets in the bulwarks would still have been obstructed to the same extent.

Thus the petitioner was held finally liable for all the damage solely because of a statement of Hollaar about tarpaulins which related to but one of the three grounds on which the finding of joint negligence was based. At most it was but a contributing cause of the damage. *Oxford Paper Co.* v. *The Nidarholm, infra* (at p. 685).

We respectfully submit that a writ of certiorari should issue to reconcile this conflict between the First and Second Circuits.

POINT II.

The decision below, in holding the petitioner ultimately liable for the whole loss, notwithstanding the finding that the Lafcomo was unseaworthy with respect to the cargo as stowed, is in probable conflict with the decision of this Court in *Oxford Paper Co.* v. *The Nidarholm.*

The District Court held that the stowage of the cargo so as to block off part of the freeing ports, mooring rings and scuppers in the bulwarks, thereby making it impossible for the water to clear the decks readily, with the result that the lower tiers of the stow were periodically submerged in sea water, rendered the Lafcomo unseaworthy *quoad* the deck cargo (R. 920-922, 926; Conclusion of Law No. VI, R. 945).

The Circuit Court of Appeals, upholding the District Court's finding of negligence in the stowage of the cargo,

said (R. 978): "The ship was thus unseaworthy in respect to its carriage."

This Court, in *Oxford Paper Co.* v. *The Nidarholm*, 282 U. S. 681, said (p. 684):

> "By the terms of the charter party there was an affirmative warranty of seaworthiness on the part of the vessel which would otherwise have been implied. *The Caledonia*, 157 U. S. 124, 130, 131. This warranty extends to unseaworthiness of the ship due to faulty stowage of cargo, *Corsar* v. *Spreckles*, 141 Fed. 260, even though the charterer himself, subject to supervision of the captain, loads the vessel, *The Seguranca*, 250 Fed. 19. The charterer is entitled to rely on the master, in the exercise of his expert knowledge and judgment, to control the disposal of cargo so as to avoid dangers *to it* from any consequent unseaworthiness of the vessel." (Emphasis ours.)

It was argued there that the responsibility of the ship, when loaded by the charterer, is limited to faulty stowage which endangers the ship and that when the cargo alone is endangered the loss must be borne by the charterer.

This Court did not accept that view, saying (p. 684):

> "We are not aware of any case in which the rule thus broadly stated has been applied so as to relieve the ship from liability for damage to cargo exposed, by bad stowage, to sea perils peculiarly within the specialized knowledge and experience of the master."

Now certainly the stowing of these pips in such a way as to block off and obstruct part of the drainage outlets in the bulwarks was peculiarly the responsibility of the master. He was there with his chief officer supervising the stowage and it was incumbent upon him to see that the pips were not stowed so as to make the ship unseaworthy for their carriage.

The same is true of the stowage on the deck plating. Again the responsibility was upon the master, who was supposed to know whether or not the deck was a safer place to stow the pips than the tops of the hatches and to act accordingly. No matter what conversation Hollaar may have had with the master about the stowage the responsibility for seeing that the vessel was not made unseaworthy never left the master.

While this Court, in deciding *The Nidarholm* case, was not required to go beyond holding that the ship-owner was not liable for all the loss because the master was not under a duty to prevent the charterer from loading the pulpwood as it did, the opinion nevertheless states very clearly that the ship-owner cannot escape responsibility altogether as against the charterer if the ship is made unseaworthy as to the cargo by faulty stowage. Here the ship-owner, so far as the petitioner is concerned, was completely exonerated, in spite of the Lafcomo's unseaworthiness resulting from stowage which was under the active supervision of the ship's officers from beginning to end. The error in this holding seems manifest.

As to whether the owner or charterer of a ship under time charter has the duty of stowing the cargo, the rule in the Second Circuit has been that the duty is on the owner, in the absence of a contract or binding custom to the contrary, even though the work is done by stevedores employed and paid by the charterer. It was so decided in *Munson S. S. Line* v. *Glasgow Nav. Co. Limited,* 235 Fed. 64 (C. C. A. 2).

In *The Centurion,* 57 Fed. 412 (S. D. N. Y.), it was held that responsibility for stowage on a chartered ship may devolve upon the charterer if he undertakes to do the stowing. But there the cargo was stowed exclusively by serv-

ants of the charterer under the supervision of the charterer's super-cargo and the cargo which was damaged was stowed in the tween decks against the advice of the ship's officers.

In *The Kaupanger*, 241 Fed. 702 (S. D. N. Y.), Judge Learned Hand recognized the rule that a ship under time charter has the duty of loading and stowing the cargo but said that the duty could devolve upon the charterer by his assuming it. The charter there did not require the master to supervise the stowage and in fact it was in charge of the charterer's super-cargo. The Court held, however, that while the charterer had undertaken to stow the cargo it could impose that duty at any time upon the vessel and did so when the super-cargo asked the master whether the charterer could load a deck cargo and the master consented.

See also, *The Arnold Maersk*, 1924 A. M. C. 671 (S. D. N. Y.), and *Knohr & Burchard* v. *Pacific Creosoting Co.*, 181 Fed. 856 (W. D. Wash.).

We cannot see how Clause 8 of the present charter (*supra*, pp. 5, 6) would, even *prima facie*, transfer the duty of stowing from the owner to the charterer, where supervision of the stowage by the master was expressly reserved. However that may be, the active participation of the Lafcomo's officers in the stowage of these pips certainly reimposed the duty on the ship, even if it originally devolved upon the charterer under Clause 8. *The Kaupanger, supra.*

The case of *Canadian Transport Co., Ltd.* v. *Court Line, Ltd.* (1940), A. C. 934, a House of Lords decision, cited by the Court below (R. 978) as authority for holding the petitioner for the entire damage, actually supports our position. The case came before the Court of first instance on a special case stated by an arbitrator. The charter con-

tained a clause similar to present Clause 8. The ship-owner paid claims of cargo-owners based on improper stowage and obtained reimbursement from its indemnity association and the association, by right of subrogation, then proceeded against the charterer in the name of the ship-owner for indemnification.

The House of Lords, affirming the Court of Appeal, 64 Lloyds List Law Reports 57, held that under the naked clause the primary obligation of stowing the cargo was on the charterer. Lord WRIGHT pointed out, however (p. 942) that the arbitrator's award stated that no evidence had been produced by either party as to the loading or as to the extent, if any, to which there had been supervision by the captain, or whether there had been any protest or approval by him in respect of the stowage. He further said (p. 944) that "to the extent that the master exercises supervision and limits the charterer's control of the stowage, the charterer's liability will be limited in a corresponding degree." He then added (p. 945), "The master's power of supervision is obviously not limited to matters affecting seaworthiness."

The record here contains the evidence which was missing in the *Canadian Transport* case. Not only did the master and chief officer supervise the stowage (Finding No. 64, R. 944), but Hollaar and the chief officer exchanged expressions of approval thereof when the work was finished (Wood, R. 573, 574).

The case of *The Thomas P. Beal*, 11 Fed. (2d) 49 (C. C. A. 3), on which our opponents rely, is readily distinguishable from this case. (The writer was counsel for the cargo-owner there.) The steamer Thomas P. Beal was under time charter in the Government form. A shipment of barrels of perilla oil was stowed in the cross bunker next to

the engine room and the heat shrank the barrel staves, causing the oil to leak out. The charterer was held primarily liable. However, Clause 9 of the Beal charter, which corresponded with Clause 8 of this charter, did not provide that the stowage should be done by the charterer under the master's supervision (Beal Record, 873). The master and officers of the ship had nothing whatever to do with the stowage and the charterer, as the Court held (p. 53), assumed all responsibility therefor.

The decision of the Circuit Court here is, we believe, clearly contrary to the law as stated by this Court in *Oxford Paper Co.* v. *The Nidarholm, supra,* with respect to the responsibility of the ship-owner, as against the charterer, for damage to cargo resulting from unseaworthiness brought about by faulty stowage. We therefore respectfully submit that this decision should be reviewed on certiorari.

POINT III.

The decision below, in failing to hold Tampa Inter-Ocean ultimately liable for the whole loss, is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Seguranca.*

In *The Seguranca,* 250 Fed. 19 (C. C. A. 5), the charterers of the steamer Seguranca sued the vessel and her master to recover freight belonging to them which had been collected by the ship-owner from a consignee. The master claimed as an offset the expense of removing part of the cargo which was necessitated by allegedly improper loading of the vessel by the charterers' stevedores.

Clause 15 of the charter stated that the charterers or their agents should provide and pay a stevedore to stow

the cargo under the supervision of the master. The stevedore, Tracey, testified that the loading was done in a manner known to and approved by the master and that the additional cargo, which was the subject of the dispute, was loaded on the ship only after he advised the master of his intentions and that the master made no objection until after the cargo was loaded, when a list became apparent. The evidence was conflicting as to whether the admitted tenderness of the ship after she was loaded was due to improper stowage or to the crankiness of the ship.

The District Court concluded that any improper stowing of the cargo was due to the joint fault of the stevedore and the master and emphasized Clause 15 of the charter, which made it the master's duty to supervise the stowing.

The Circuit Court sustained the District Court's decision and refused to allow the master *any part* of the offset claimed. In other words, the Court placed *all* the liability on the ship as against the charterer.

The Circuit Court here, in requiring the petitioner to pay all Pioneer's damage in the final analysis, even went counter to its prior decision in *Olsen* v. *United States Shipping Co.*, 213 Fed. 18 (C. C. A. 2).

In the *Olsen* case the steamer Bergenhus, under time charter in the Government form, proceeded from Mobile to Gulfport to complete her loading. The charterer loaded timber on deck forward and aft. The after deck load was lashed by the crew but the forward deck load could not be lashed at that time because loading was not completed until after dark. The charterer was anxious to have the vessel leave for Ship Island, so the master backed the ship up preparatory to leaving, without lashing the forward deck load. The ship struck the side of the bank and some of the wooden uprights supporting the deck load were broken and

20 logs were thrown off. After a survey, 217 more logs were discharged and all the logs were rafted to Ship Island for reloading. When the vessel arrived at Ship Island her largest ballast tank could not be filled because of damages sustained while loading. She then had a list of about 14 degrees and the master refused to load the logs rafted from Gulfport. The charter insisted on a survey, however, and the surveyor said that the logs could be reloaded without affecting the steamer's seaworthiness. The master received them under protest. When the vessel left port her list increased to such an extent that part of the forward deck load of logs was jettisoned.

The Court held that the Bergenhus was unseaworthy on leaving Ship Island and that the jettison was necessitated by the ship's instability; that it was immaterial whether this was due to the amount or stowage of the deck load alone or in part to the impossibility of filling the ballast tank. The Court refused to impair the owner's implied warranty of seaworthiness by casting liability on the charterer. It emphasized that all matters pertaining to seaworthiness were under the master's absolute control; that it was his duty to see that they were right; and that he was not excused by the fact that the charterers did the loading and insisted upon his taking the deck load.

Had the lower Court followed its decision in the *Olsen* case, the very least it should have done here, in any aspect of the case, was to divide the loss equally between shipowner and charterer.

In view of the conflict of the decision below with the decision in *The Seguranca* and the lower Court's previous decision in *Olsen* v. *United States Shipping Co., supra,* we submit that a writ of certiorari should issue in order that the law on this subject may be settled by this Court.

POINT IV.

The Court below, in holding that Pioneer did not assume the risk of damage to the cargo solely through wetting by sea water shipped by the vessel, has either rendered a decision which is in probable conflict with the decisions of this Court in *Lawrence* v. *Minturn* and *The Delaware,* or has decided a novel question of federal law which should be finally settled by this Court.

We venture to say that this is the first case in the annals of the admiralty law in this country, with one lone exception, where a suit for damage to deck cargo has been based solely on its getting wet by the seas shipped by the vessel in rough weather. The only exception we know of is *The Carriso,* 30 Fed. (2d) 279 (C. C. A. 9). There the cargo-owner made claim for sea water damage to a shipment of cork board which was carried on deck. It was shown that cork board was susceptible to damage by salt water and it was contended that the carrier therefore acted wrongfully in placing it on deck under a general clause in the bill of lading authorizing the carriage of any cargo on deck. The carrier nevertheless was exonerated. The cargo-owner at least had a *prima facie* basis for a claim for it had made no specific agreement for deck stowage. Here there was a specific agreement.

The issues in deck cargo cases hitherto have revolved around such questions as unjustified jettison, overloading, and the improper securing of the cargo resulting in its coming adrift and being washed overboard or jettisoned. No such issues are involved here for the cargo was so well secured that none of the cases shifted or were lost overboard in spite of the heavy seas which came over the vessel (Finding No. 33; R. 937, 938). The loss was due

entirely to wetting by sea water. But the wetting of deck cargo by the seas has, up to this time, been considered one of the risks which the shipper assumes when he consents to deck stowage. As Anderson, one of the carrier's experts, succinctly put it, a shipper who asks that his cargo be stowed on deck, "must expect it to get wet in winter on the North Atlantic" (R. 442, 443; see also, R. 413).

As already stated, Pioneer was offered under deck stowage in the squares of the hatches of the Nos. 1 and 2 tween decks, but its agents refused to accept it (*supra*, pp. 4, 5). The witnesses for both sides agreed that the tween decks would have been a much safer place to stow the pips than on deck (G. Patterson, R. 126; Claridge, R. 860; Lynner, R. 263; Cocks, R. 351, 352).

Hollaar's suggestion that the pips be stowed in the tween decks was a wise one. In the absence of refrigeration it was the best compromise possible and the shipper should have accepted the offer. It was a practical certainty that the pips on a westbound Atlantic crossing in the winter were going to get wet on deck, whether covered with tarpaulins or not, and whether stowed on the deck plating or the hatch tops. Tarpaulins, aside from being positively detrimental to the pips from the standpoint of ventilation, which the shipper required, would have been wholly ineffectual as a protection from the elements (Cocks, R. 351; Anderson, R. 411-418; Pilcher, R. 450, 451; 453-455; Claridge, R. 858, 859; Lynner, R. 256, 257).

The petitioner contends that Pioneer, by insisting on deck stowage when it could have had stowage under deck, assumed the risk of the wetting of the cargo by sea water as one of the risks inherent in deck stowage. The goods did not get wet because of the absence of tarpaulins or because of their particular location on deck. They would

have been wet in any event. The case therefore seems clearly to fall within this Court's decisions in *Lawrence* v. *Minturn*, 17 How. 100, and *The Delaware*, 14 Wall. 579.

In *Lawrence* v. *Minturn* the libellant sued for the non-delivery of two boilers and chimneys which were carried on deck by agreement and were jettisoned during moderately rough weather. This Court held that there was no implied warranty by the ship-owner that the vessel should prove sufficiently buoyant to carry cargo placed on deck under such a contract. It found that the ship's inability to carry the articles arose solely from their position on deck and that the necessity for the jettison was not attributable to any want of due diligence and skill. While it thought that additional supports for the lower deck probably would have assisted the vessel in bearing the weight of the cargo, it did not believe that such supports would have enabled her to carry the unusual burden through a storm, and said that even if it had found negligence in this particular it could not declare that the loss was to be attributed to it.

In *The Delaware*, this Court, speaking of the carrier's responsibility as to deck cargo, said (p. 605):

> "Where goods are stowed under deck the carrier is bound to prove the casualty or *vis major*, which occasioned the loss or deterioration of the property which he undertook to transport and deliver in good condition to the consignee, and if he fails to do so the shipper or consignee, as a general rule, is entitled to his remedy for the non-delivery of the goods. No such consequences, however, follow if the goods were stowed on deck by the consent of the shipper, as in that event neither the master nor the owner is liable for any damage done to the goods by the perils of the sea *or from the necessary exposure of the property*, * * *"
> (Emphasis ours.)

The question as to whether the shipper of deck cargo assumes the risk of its getting wet by sea water which comes over the ship's deck, has, we believe, either been determined in the petitioner's favor by the decisions in *Lawrence* v. *Minturn* and *The Delaware* or it is a new question for this Court. In either event we submit that a writ of certiorari should be issued to settle the question.

POINT V.

If the carrier was at fault in the stowage of the cargo, the shipper was also at fault in unnecessarily exposing its goods to the elements. The lower Court therefore erred in refusing to divide the damages equally between shipper and carrier.

The lower Court held that there was no basis for the application of the rule of divided damages as Pioneer was not at fault (R. 978). But if a shipper who insists on exposing goods such as lily of the valley pips on the open deck of a ship when he could have had them stowed under deck is not guilty of a negligent disregard of their safety we cannot imagine what would constitute negligence. In saying this we are assuming the correctness of the Court's holding that "salt water is obviously harmful to plant life."

The half damage rule has been applied by Courts of Admiralty in cases other than collision cases where mutual fault has been found.

In *The Max Morris* v. *Curry*, 137 U. S. 1 (11 Sup. Ct. Rep. 29), which involved injuries to a longshoreman partly through his fault and partly through that of the vessel, this Court divided the damages, holding that the rule is applicable to all cases of marine tort prosecuted in

admiralty as in harmony with the rule for the division of damages in collision cases.

In *The Georgian,* 4 Fed. Supp. 718 (S. D. Fla.) affirmed, *The Georgian,* 76 Fed. (2d) 550 (C. C. A. 5) the libellant, suing for damage to a refrigerated cargo of citrus fruit, charged that the temperatures were allowed to fluctuate beyond the agreed limits, thereby injuring the fruit. The respondent claimed that the fruit was injured by pre-shipment cleaning treatment, causing softening and decay. The Court found the damage attributable both to inherent vice and negligent refrigeration and divided the damages equally, by analogy to the collision rule.

In *Snow et al.* v. *Carruth et al.,* 22 Fed. Cases, 724 (No. 13,144) the same rule was applied where damage to cargo was due both to the fault of the cargo-owner and the carrier. This case was cited with approval by this Court in *The Max Morris* v. *Curry, supra.*

It was argued below that this is not a tort case. The allegations of the libel (R. 6-9), particularly the charge of negligence in Article Seventh, show, on the contrary, that the suit is founded in tort. The relationship of the parties of course arose out of a contract and their rights are measured by the terms of the bill of lading, but the action patently is one in tort. *Atlantic & P. Ry. Co.* v. *Laird,* 164 U. S. 393 (17 Sup. Ct. Rep. 120); see also, *The Pacific Spruce,* 1 Fed. Supp. 593 (W. D. Wash.).

Because this undoubtedly is a case where the damages should be divided between shipper and carrier, if there was fault on the part of the carrier, and because the Circuit Court's decision on this point probably is in conflict with *The Max Morris* v. *Curry, The Georgian,* and *Snow et al.* v. *Carruth et al.,* we respectfully ask that this question also be reviewed on certiorari.

POINT VI.

The Court below, in enforcing against the petitioner an alleged oral agreement to cover the goods with tarpaulins, which antedated the bill of lading and was not incorporated therein, has rendered a decision which is in conflict with the decisions of this Court in *The Delaware* and *The Thames*.

Pioneer relies on an alleged special oral agreement with the petitioner preceding the execution of the bill of lading, under which the pips were to be covered with tarpaulins. We submit that such agreement, if it ever existed, was merged in the bill of lading (Lib. Ex. 7, R. 878), which was silent about tarpaulins. Hence there was no basis for enforcing the alleged agreement against the petitioner.

In *The Delaware*, 14 Wall. 579, the bill of lading did not specify where the goods were to be stowed and accordingly it was held to be a contract for stowage under deck. The carrier offered evidence of an antecedent oral agreement that the goods were to be stowed on deck. This was held inadmissible as an attempt to contradict or vary the terms of the written contract (pp. 603, 604).

In *The Thames*, 14 Wall. 98, this Court said (p. 105): "The contract between the ship and the shipper is that which is contained in the bills of lading delivered."

As the holding of the Court below clearly is contrary to the decisions in *The Delaware* and *The Thames*, we submit that a writ of certiorari should issue to correct the error.

POINT VII.

The evidence does not support the findings of the lower Courts that an agreement to cover the goods with tarpaulins was made.

We are of course familiar with the rule frequently stated by this Court that concurrent findings of the lower Courts will not be disturbed unless plainly without support. But the finding that the petitioner agreed with the shipper to cover the cargo with tarpaulins flies so directly in the face of the bill of lading, which constituted the contract, as to be wholly without support, we believe.

In this connection may we recall this Court's decision in *Electric Storage Battery Co.* v. *Shimadzu,* 307 U. S. 5, a suit for patent infringement. There both lower Courts found that the Battery Company had not established two years prior public use of the invention (generally considered to be a question of fact) against Shimadzu. They held that use of the invention in the alleged infringer's plant was not a public use. This Court held that it was and the Circuit Court's decree in Shimadzu's favor was reversed.

The issue here is whether the shipper withdrew its request for tarpaulins on being advised that they would make ventilation of the pips impossible; something the shipper desired above everything else (Deuber, R. 300-306). Reference is made in our petition (pp. 4, 5) to the various telephone conversations at the time of the booking. We shall confine our discussion of this issue to two items of evidence.

Pioneer relies on a so-called loading permit prepared directly after the first telephone talk between Van Voort and Kruyne. It was not a loading permit at all as it was drawn up by the shipper's agents. It contained a notation supposedly that the pips were to be covered. It was prepared Saturday, November 25th, and was delivered to the stevedores on the afternoon of that day (Lib. Rotterdam Ex. A, R. 897; translation, R. 722).

The petitioner contends that after this so-called permit was prepared the shipper revoked the demand for tarpaulins and as conclusive evidence of this we point to the bill of lading (Lib. Ex. 7, R. 878) which was prepared *by the shipper's agents* on Sunday, November 26th, and which said nothing about tarpaulins. Only the stamped clauses were added by the petitioner's agents. It was then redelivered to the shipper and nothing further was heard about tarpaulins although the Lafcomo remained at Rotterdam for almost three days longer (Jahn, R. 584, 585).

Because of the shipper's deliberate omission of a provision for tarpaulins in the bill of lading, which was drawn up by its own agents the day following the final talk between Van Voort and Kruyne, the evidence assuredly is contrary to the finding that the shipper's demand for tarpaulins was not withdrawn. We therefore respectfully ask that this question also be reviewed on certiorari.

POINT VIII.

The lower Court erred in holding that the stowage was negligent and was the proximate cause of the loss and that the case, in any event, falls within the rule of *Schnell* v. *The Vallescura.*

This is the plainest sort of a case of lack of any causal relation between the alleged negligent stowage and damage to the cargo. Had the pips been stowed exactly as Pioneer now claims they should have been stowed, the shipment, if it had ever reached New York, which is doubtful, would have arrived badly damaged and depreciated in value through a variety of causes.

If the cargo had been stowed on the hatches it would have projected some eleven feet above the deck and three feet above the forecastle. It surely would have been hit by the seas coming from ahead and over the sides and with equal certainty would have been broken up and probably most of it washed overboard. Tarpaulins would have been useless as a protection as they would soon have been torn to pieces (Pilcher, R. 448-455; Anderson, R. 411-418; Cocks, R. 348-351). There admittedly were advantages and disadvantages both in the hatch tops and the deck plating as places of stowage. If on the hatches the stow would of course have been three feet above the deck but would have been in a more exposed position and infinitely more difficult to secure than when on the deck plating.

Surely it was error to hold the carrier negligent in the stowage when it was a question of balancing the advantages and disadvantages of the two places.

Again, the shipper was taking a tremendous risk in shipping the pips without refrigeration contrary to the universal practice. Without any tarpaulins at all around them, the pips, under temperatures averaging 52 degrees F., as they did on this voyage, would have sprouted even if they had not been damaged by sea water. Also, with the temperature above 50 degrees F. they would have generated heat and rotted in the middle. This was the testimony of Pioneer's principal Rotterdam witness, Jan Philippo, Jr. (Dir. Int. 5 (8); R. 590, 591; Cross Int. 10; R. 599). If the pips had been enveloped in tarpaulins they would have sprouted as if planted in a hot house (Kuer, R. 505). As sprouted pips their value would have been very small and it probably would have been necessary to dispose of them to street hawkers (Langeler, R. 487; Kuer, R. 504). The reason why the pips showed no sprouting on arrival was that the sea water had inhibited their growth and killed the cells in the roots (Lib. Ex. 12; R. 885, 886; Zimmerman, R. 209).

The lower Court, as one of the grounds for affirming the decree, said that the carrier "has not been able to prove what the damage would have been if proper stowage had been made," citing *Schnell* v. *The Vallescura*, 293 U. S. 296.

In *The Vallescura*, as the Court will recollect, the decay in the onions was due to two causes, one faulty ventilation, for which the carrier was liable, and the other sea peril, for which it was not liable. The carrier was not able to show how much of the decay was attributable to sea peril and consequently was held liable for all the loss. The basis of the decision, as we understand it, was that the carrier had the burden of bringing the damage within the exception of sea peril, within the rule of *The Folmina*,

212 U. S. 354, and had not sustained its burden because the shipper showed that the loss was due either to sea peril or negligence.

Here, however, we have a case involving deck cargo, where the carrier, as this Court pointed out in *The Delaware, supra,* does not have to prove a sea peril to secure exoneration. Pioneer not only took the risk of perils inherent in deck stowage, but the further risk of loss because of lack of refrigeration, which was a very serious risk. Therefore it was Pioneer's burden, we submit, to show that its goods would not have been damaged but for the carrier's negligence. It could not sustain this burden in the face of the damaging testimony of its own witness Philippo.

Furthermore, it is questionable whether the rule of *The Vallescura* has survived the Carriage of Goods by Sea Act, 46 U. S. C. A., §§ 1300 *et seq.,* adopted in 1936. Under that Act, as construed to date, the cargo-owner has the burden of proving that the unseaworthiness of the carrying vessel was the cause of his loss, even though the ship-owner may not have established that due diligence was used to make the ship seaworthy. *The Aakre,* 31 Fed. Supp. 8, 12 (S. D. N. Y.); affirmed, *The Aakre,* 122 Fed. (2d) 469 (C. C. A. 2); *The Temple Bar,* 45 Fed. Supp. 608, 613 (D. C. Md.). While the Act excludes deck cargo, the cargo-owner's burden as to deck cargo certainly cannot be less than in the case of under deck cargo.

Because it is certain that the pips would have been damaged no matter how they were stowed and because of the serious doubt as to the applicability of *Schnell* v. *The Vallescura,* we respectfully ask that the questions just discussed also be reviewed by this Court.

POINT IX.

The questions presented are of general interest and unusual importance.

This case brings up the question as to the responsibility for faulty stowage, as between the owner and time-charterer of a vessel, where the charter provides that the charterer shall stow the cargo under the master's supervision. It squarely presents the point, which this Court left open in *Oxford Paper Co.* v. *The Nidarholm*, as to whether the master's supervision is limited to stowage which endangers the ship or whether it includes stowage which imperils the cargo. It also involves the question of apportionment of liability between ship-owner and charterer, where both have participated in the stowage and have been found chargeable with faults which contributed to the damage to the cargo. These are all questions of the utmost importance, which it was not necessary for this Court to dispose of finally in *The Nidarholm*, because of the failure of the ship-owner there to ask for certiorari. Neither were they definitely settled by the House of Lords in *Canadian Transport Co. Ltd.* v. *Court Line, Ltd.* (*supra*, pp. 26, 27) for the evidence as to the owner's participation in the stowage, which this record contains, was lacking there.

This case also presents, for the first time, the question as to whether a shipper assumes the risk of damage to deck cargo solely through wetting by sea water shipped by the vessel, regardless of any finding of negligent stowage; also the question whether a shipper who insists on the stowage of vegetable cargo, susceptible to salt water damage, on a ship's deck in the winter-time, is guilty of fault justifying the application of the half-damage rule.

The question as to whether the parol evidence rule bars Pioneer from relying on the alleged oral agreement to cover the pips and the further question as to the applicability of *Schnell* v. *The Vallescura* to this case are fully deserving of consideration by this Court.

The question as to the propriety of the stowage and the factual question regarding tarpaulins, while undoubtedly lacking the general interest of the other questions, are important in this case and we respectfully ask that they be included in the review, if a writ of certiorari is granted.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, December 24, 1943.

JOHN W. CRANDALL,
Counsel for the Petitioner.

HUNT, HILL & BETTS,
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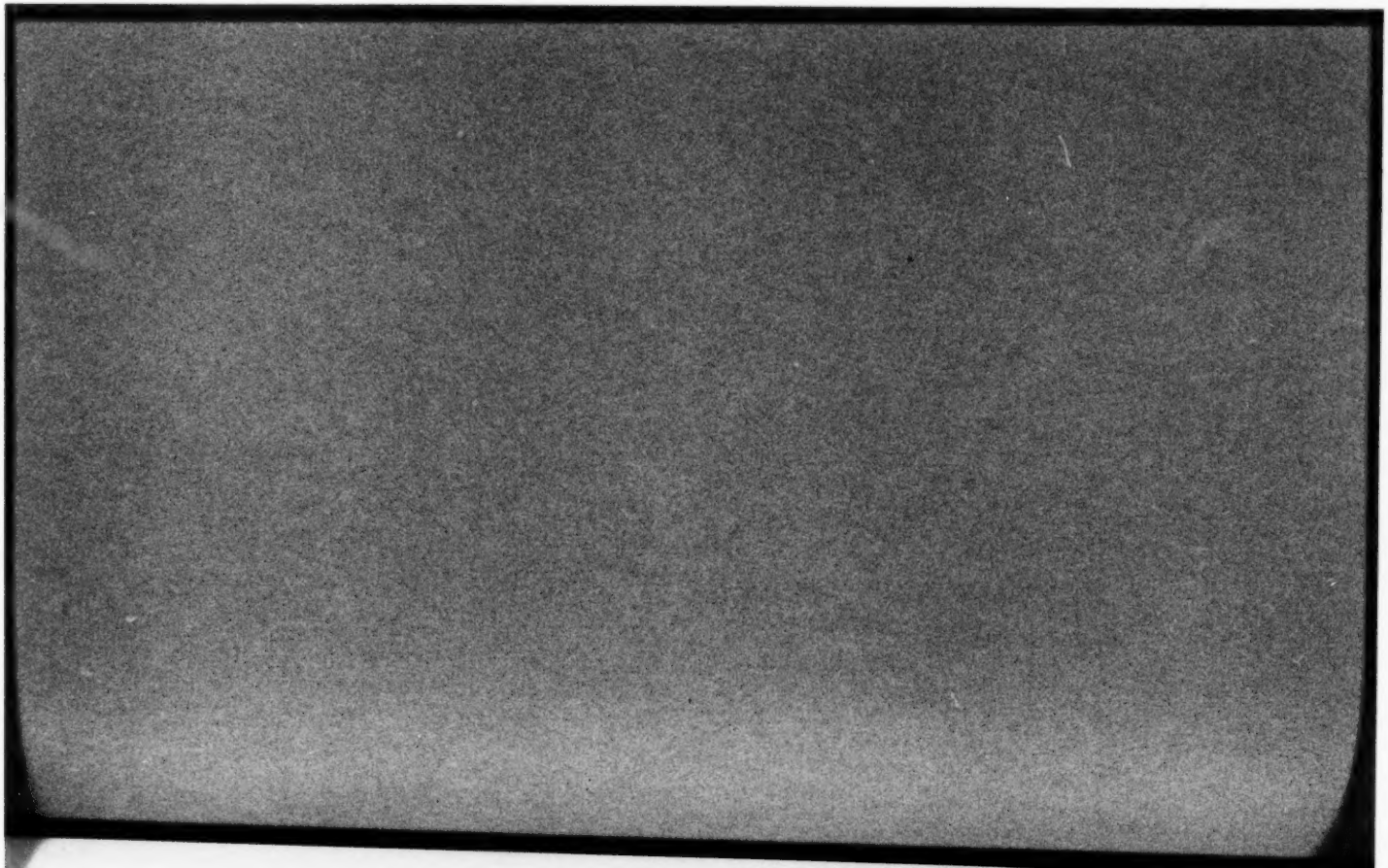

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IN THE

Supreme Court of the United States

OCTOBER TERM—1943.

No. 570.

BLACK DIAMOND LINES, INC.,
Petitioner,
(Respondent-Appellant below),

against

PIONEER IMPORT CORPORATION,
Respondent,
(Libellant-Appellee below),

and

TAMPA INTER-OCEAN STEAMSHIP COMPANY,
Respondent,
(Claimant-Appellant-Appellee below).

BRIEF OF RESPONDENT TAMPA INTER-OCEAN STEAMSHIP COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

In opposition to the petition for a writ of certiorari, and in reply thereto, respondent, Tampa Inter-Ocean Steamship Company, respectfully shows:

Statement of Facts.

The District Court and the Circuit Court of Appeals both held the petitioner liable *in personam* and the S. S. *Lafcomo in rem* for damage to a cargo of lily of the valley pips carried on deck under on-deck bill of lading. The

basis of liability was improper stowage. Ultimate liability was placed upon the petitioner as charterer of the *Lafcomo.*

The petitioner selected and paid the stevedores who stowed the cargo. The petitioner's European port captain gave all the orders which were given to the stevedores as to the place and manner of stowage.

The respondent, Tampa Inter-Ocean Steamship Company was the owner of the S. S. *Lafcomo.* It chartered her on Government time form under date of October 19, 1939 to the Petitioner Black Diamond Lines, Inc., for one voyage from New York to Rotterdam and Antwerp and return. This charter party provided:

CLAUSE 2:

> "* * * Charterers are to provide necessary dunnage and shifting boards, also any extra fittings requisite for a special trade or unusual cargo * * *".

CLAUSE 7:

> "That the whole reach of the Vessel's hold, Decks and usual places of loading (not more than she can reasonably stow and carry), also accommodations for Supercargo, if carried, shall be at the Charterers' disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel."

CLAUSE 8:

> "That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim the cargo at their expense

> under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts."

This is not the usual case of a ship being chartered by the owner to a shipper, but one chartered by an owner to a carrier. The Petitioner had a regular service between New York and Rotterdam and Antwerp with shore organizations in all three ports. Neither the *Lafcomo* nor her officers had any experience in that trade or with the particular kind of cargo carried.

The Petitioner booked 1847 cases and 20 bundles of 4 cases each of lily of the valley pips for transportation from Rotterdam to New York on deck. The bill of lading was signed by the Petitioner's agent and provided for stowage on deck at the shipper's risk.

The most bitterly disputed issue in the District Court was whether an agreement had been made between the Petitioner and the shipper for covering the cargo with tarpaulins. The District Court found that such an agreement had been made, although it was not incorporated in the bill of lading.

The District Court also found that Petitioner's agents and its European port captain instructed the stevedores, the master and officers of the *Lafcomo* that the cargo was not to be covered.

The District Court also found that the shipper requested stowage on the foredeck.

There was no way in which these pips could be carried on the foredeck as directed by the shippers, uncovered, and be protected from damage by salt water. The minute they were stowed uncovered they were doomed to destruction.

Stowage of the cargo was under the direction of Captain Hollaar, the European port captain of the charterer. Cap-

tain Hollaar testified as to his duties in connection with the stowage of this cargo, as follows:

Rec. 654:

> "The indication of the location where the parcel should be loaded on board the S.S. *Lafcomo,* the manner in which this should be done. The supervision in general of the loading operations and also in general the checking up of the outward condition of this shipment at the time of delivery alongside. The agreeing with the ship's staff as the way of securing the shipment on deck."

* * * * * * *

Rec. 666:

> "Seeing that the parcel was stowed in a seaman-like manner, where and as required by the shipper. Establishing the time at which the loading had to be undertaken."

* * * * * * *

Rec. 682:

> "I did instruct the stevedores to use dunnage on the deck and place fence boards along the railing as a result of my conversation with the Master and his staff about the stowage. As to the covering of the parcel, both Van Nievelt, Goudriaan & Co. and myself informed the stevedores that the shippers' representatives had revoked his orders for covering the parcel. Revoking the order for covering was the result of a discussion between Messrs. Van Nievelt, Goudriaan & Co. and the shippers' representative."

* * * * * * *

Rec. 684:

> "With regard to the actual loading and stowing I kept a GENERAL supervision. With regard to the

protecting there were no activities needed since the shipper had abandoned his wish for covering the parcel. With regard to the securing of the cargo I was satisfied to the notice that the ship's crew under the direction of their officers made a good job of this."

* * * * * * *

Rec. 685:

"I informed both the officers and the stevedores that the shippers' representative had revoked his demand for covering the parcel, with the tarpaulins."

The Court found that the pips could have been protected from salt water damage by stowage on top of the hatches and covering with tarpaulins:

Rec. 938:

Finding 35: The 1847 cases and 20 bundles of 4 cases each of lily of the valley pips comprised a total of 9309 cubic feet (118 short tons) which could all have been stowed safely on top of Nos. 1 and 2 hatches (themselves three feet above the deck) in piles of 6½ to 6¾ feet high without danger to the vessel's stability; thus stowed on top of dunnage on such hatches and covered with three tarpaulins, one underneath and two on top, the top tarpaulin overlapping the bottom tarpaulin and the forward top tarpaulin overlapping the after top tarpaulin, and all lashed and secured to the hatch coamings and ring bolts on the deck, the cases would have been free from the danger of submersion in the water flooding the foredeck plating, and the contents of the cases would have been protected from damage by sea water in the weather experienced on the voyage.

No one claimed that it was possible to protect this cargo from salt water damage without covering it with tapaulins. The only finding the District Court made was that it could have been protected by such coverage and stowage on top of the hatches. In fact, Captain Hollaar testified that when the shipper agreed that it should not be covered with tarpaulins nothing was done about protecting the cargo from water damage because such protection was not possible.

In placing ultimate liability on the Petitioner the Court said:

District Court (Rec. 927):

> "Respondent's witnesses stated that the ship's chief officer and the stevedores were told by respondent's port captain that the shipper's representative had revoked his demand that the cases be covered with tarpaulins. As hereinabove stated, I have concluded that the shipper's representative did not revoke the demand that the shipment be covered. In view of this unfounded representation by respondent's agents to the ship's officers as to the alleged withdrawal of the shipper's demand, I am of the opinion that as between the respondent and the claimant, the respondent should bear the entire loss and that the respondent should be required to reimburse the claimant for any sum which the claimant may be required to pay in satisfaction of libellant's claim for damages."

The Circuit Court of Appeals (Rec. 978):

> "And since as the Court found Libellant's demand for tarpaulin coverage was never withdrawn, the statement of respondent's agents to the *Lafcomo's* captain to the effect that tarpaulins were not needed was a gross misrepresentation of fact and Respondent should therefore be held for the entire damage as against the claimant. *Canadian Transport Co. Ltd.* v. *Court Line, Ltd.* (1940) A. C. 934."

SUMMARY OF ARGUMENT.

The question of responsibility as between the Petitioner and the "LAFCOMO" was correctly decided by the District Court and the Circuit Court of Appeals and their decisions are not in conflict with those of this Court or any other Circuit.

POINT I.

There is no conflict between the opinion of the Circuit Court of Appeals and that of the Circuit Court of Appeals for the First Circuit, in *The Nidarholm*, 34 Fed. (2d) 442.

In the *Nidarholm* case the vessel was held to be unseaworthy because it was top heavy. The Court said:

> "The facts are stated in the opinion of the District Judge and need not be repeated 26 F. (2d) 92. His conclusions that the steamer, because of excessive loading and too much deck cargo was top heavy and unseaworthy when she began the voyage—faults for which her master was responsible, were clearly correct."

The *Lafcomo* was in proper trim. She was not unseaworthy in respect to her ability to navigate properly. In the *Nidarholm* case the Court said:

> "As to the dangers of a distinctly maritime character and unusual stresses set up by the movement of a vessel at sea which lie peculiarly within the knowledge and experience of mariners, the charterers were entitled to rely on the master's judgment."

But here we have a case where the petitioners as charterers were more experienced than the master. It was their trade.

While they had not handled this particular kind of plant before that, they had handled other live plants. The officers of the "LAFCOMO" had never carried live plants either as deck or underdeck cargo. Special knowledge and experience was with the charterers and not with the owners.

The Circuit Court of Appeals in *The Nidarholm* cited with approval *The Thomas P. Beal,* 11 Fed. (2d) 49 (3 C. C. A.). That was a case where the charterer was also a carrier and as between the charterer and the owner, the charterer was held liable for damage to cargo due to stowage which did not affect the seaworthiness of the ship as a ship, but was improper stowage so far as danger of damage to the cargo was concerned.

POINT II.

There is no conflict between the decision of the Circuit Court of Appeals and that of this Court in *The Nidarholm* case.

The charterers in *The Nidarholm* case, 282 U. S. 681, petitioned for and obtained a writ of certiorari. Mr. Justice Stone said:

> "This court granted certiorari (281 U. S. 712) on a petition which relied in part on an alleged conflict of the decision below with that of the Court of Appeals for the Second Circuit, in *Olsen* v. *U. S. Shipping Company,* 129, C. C. A. 607, 213, Fed. 18."

and in referring to the decision of the Lower Court, said (282 U. S. 680, 75 L. ed. 614) at 617:

> "Whether the court considered the topheaviness of the ship, caused by the faulty stowage, and the defective cribbing to be joint contributing causes of the loss, or thought the latter the proximate cause,

is not clear. But it reached the conclusion, without referring to any supporting facts, that the construction of the cribbing was a joint undertaking carried out by the charterer and the vessel, for the failure of which both were at fault, and decreed that the loss be divided.

"As respondent did not ask certiorari, the only question we shall consider is whether the court below was wrong in denying the asserted liability of the ship for the entire loss."

At 621:

"The owner's duty to provide a seaworthy and cargo-worthy ship at the beginning of the voyage did not extend to the defective cribbing. That warranty applies only to the ship and such equipment as is called for by the charter party". * * *

"Even though the master's duty of supervision of cargo stowage might, for some purposes and under other circumstances, be deemed to extend to the erection of this structure as a means of stowing the deck load, still we think there was no duty of ship or master to prevent the charterer from loading the pulpwood in such manner as to expose it to dangers ordinarily incident to the transportation of a cargo on deck, and not peculiarly within the prevision of the master. See *Lawrence* v. *Minturn*, 17 How. 100, 115, 15 L. ed. 58, 64. The charterer knew, as well as the master, that the ship would heel or roll at sea, and that the cribbing must be made sufficiently strong to hold the cargo on deck. We see no more reason for imposing responsibility on the ship for such an omission by the charterer than for the master's failure to prevent the charterer from stowing cargo in such manner that it is damaged by heat, The Thomas P. Beal (C. C. A. 3d) 11 F. (2d) 49; or in defective containers, The Oakley C. Curtis (C. C. A. 2d) 4 F. (2d) 982, *supra*, or in

such contact with other cargo that it suffers injury, cf. Elder & D. Co. *v.* Paterson, Z. & Co. (1924) A. C. 522, 560, 562, H. L., *supra.*"

There is no conflict on any point between the decision of this Court in *The Nidarholm* and that of the Circuit Court of Appeals in this case. In *The Nidarholm* case the charterer was a shipper. In this case the Petitioner as charterer was an experienced carrier. In addition the Petitioner told the master of the *Lafcomo* that this cargo was to be stowed on the foredeck and was not to be covered with tarpaulins. There is stronger reason for imposing ultimate liability on the charterer in this case than there was in *The Nidarholm.*

POINT III.

The decision of the Court below is not in conflict with that of the 5th Circuit Court of Appeals in *The Seguranca*, 250 Fed. 19.

The Seguranca was unseaworthy in that she was top heavy, just as *The Nidarholm* was. It is the duty of the master so to stow a ship that she is in proper trim and is able to navigate. In the case of the *Lafcomo* she was in proper trim. There was nothing in connection with the stowage of the cargo that in any way interfered with her seaworthiness as a ship. The same reasons set forth above for distinguishing *The Nidarholm* case apply equally to *The Seguranca.*

POINT IV.

The question of liability as between the owner and charterer was correctly decided.

The decision of the Circuit Court of Appeals is in accord with that of the Third Circuit in *The Thomas P. Beal*, 11 F. (2d) 49 and of the House of Lords in *Court Line Limited* v. *Canadian Transport Company Limited* (1940) A. C. 934.

In *The Thomas P. Beal*, the Court said:

> "(8, 9) The terms of the charter party make it certain there was a letting of the ship as distinguished from a contract for her services. In the former case, the relation between owner and charterer becomes that of bailor and bailee; whereas, in the latter, the relation is that of carrier and shippers. Carver (4th Ed.) §112; *The Barnstable*, 21 S. Ct. 684, 181 U. S. 469, 45, L. ed. 954. According as it is one or the other the question arises—whose agents wrought the injury, and there is suggested the inquiry put by Lord Esher in 1 Q. B. 258: 'When is a captain the owner's captain?' Transposing the question, we ask 'when is the captain the charterer's servant?' Directing these inquiries to the case in hand, it is clear that within the law of The Santona (C. C. 152 F. 516, 518), opinion by Judge Hough, while the owner did not surrender possession or control or command or navigation of the ship, 'he has surrendered control of her freight and passenger capacity and handed the same over to the charterers for all lawful purposes. The ship (was) the owner's ship, and the master and crew his servants for all details of navigation and care of the vessel; but for all matters relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master

> and crew (were) the servants of the charterers'. And so the parties in this case construed the charter party, for it is perfectly clear that the charterer, first at one port and then at another and finally at San Francisco, booked the freight, designated the places of stowage, did the stowing itself through its own stevedores, and assumed all responsibility therefor. On the issue between the charterer and the ship we find the charterer liable" (p. 53).

In the *Court Line* case Lord Porter said at 951-2:

> "In my opinion, by their contract the charterers have undertaken to load, stow, and trim the cargo, and that expression necessarily means that they will stow with due care. *Prima facie* such an obligation imposes upon them the liability for damage due to improper stowage. It is true that the stowage is contracted to be effected under the supervision of the captain, but this phrase does not, as I think, make the captain primarily liable for the work of the charterers' stevedores. It may indeed be that in certain cases, as e.g., where the stability of the ship is concerned, the master would be responsible for unseaworthiness of the ship and the stevedore would not. But in such cases I think that any liability which could be established would be due to the fact that the master would be expected to know what method of stowage would affect his ship's stability and what would not, whereas the stevedores would not possess any such knowledge."

It is clear from both the American and British cases that a charterer is responsible for any bad stowage done by stevedores employed by him. The only possible exception is a situation where the master has superior knowledge and experience. In this case the superior knowledge and experience rested with the charterers and not with the master.

We have in this case a factor which did not appear in either *The Thomas P. Beal* or in the *Court Line Limited* cases. The Petitioner's Rotterdam agents and European port captain told the master that the cargo was to be stowed on the foredeck and that it was not to be covered. The Petitioners were entitled to the use of the deck of the ship. The master of the *Lafcomo* had no option as to whether he would stow this cargo on deck or underdeck; he had no option as to whether it should be covered or not covered with tarpaulins. It was only by covering the cargo with tarpaulins that it could have been protected from salt water damage. The master carried out all the duties imposed upon him in seeing that this cargo was properly secured. The responsibility for whatever liability resulted from damage to the cargo by not covering it with tarpaulins was properly placed ultimately on the Petitioner.

POINT V.

If a petition should be granted in this case, the respondent, Tampa Inter-Ocean Steamship Company, requests that the entire case be reviewed.

This Respondent believes that the petition for a writ of certiorari should be denied. If, however, it is granted, it is respectfully requested that the entire case be reviewed, and not merely the question of liability as between the Petitioner and the Respondent Tampa Inter-Ocean Steamship Company. The *Lafcomo* was held liable for breach of an agreement made between the shippers of this cargo and the Petitioner, of which it had no knowledge and which was not incorporated in the bill of lading. This it is submitted is not a proper basis for a liability of the ship *in rem*. If any review is had of the case this question should also be considered.

CONCLUSION.

It is respectfully submitted that the petition should be denied.

Dated: January 19, 1944.

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Counsel for Respondent, Tampa Inter-Ocean Steamship Company.

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IN THE

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OCTOBER TERM 1943

No. 570

BLACK DIAMOND LINES, INC.,
Petitioner
(Respondent-Appellant below),

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(Libelant-Appellee below)

and

TAMPA INTER-OCEAN STEAMSHIP COMPANY
(Claimant-Appellant-Appellee below),
Respondents.

BRIEF OF RESPONDENT, PIONEER IMPORT CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 570

BLACK DIAMOND LINES, INC.,
Petitioner
(Respondent-Appellant below),

against

PIONEER IMPORT CORPORATION
(Libelant-Appellee below)

and

TAMPA INTER-OCEAN STEAMSHIP COMPANY
(Claimant-Appellant-Appellee below),
Respondents.

BRIEF OF RESPONDENT, PIONEER IMPORT CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This cause presents no reason within Rule 38, paragraph 5, for the issuance of a writ of certiorari. Contrary to petitioner's assertions neither the decision of the District Court (R. 918-928) reported in 49 F. Supp. 559 nor that of the Circuit Court of Appeals (R. 976-8), reported in 138 F. (2d) 907, is in conflict with applicable decisions of this Court or with applicable decisions of another Circuit.

No novel questions of federal law were decided below; questions of local law were not involved. The questions raised by the petition are not of general interest or of unusual importance; they have already been answered by this Court in other cases.

By the multitude of reasons put forward for the granting of the writ, petitioner apparently hopes to make up for the lack of merit of any single reason. Actually the case is an ordinary one of damage to cargo caused by negligence of the petitioner and unseaworthiness of the ship. The principal questions are factual, not legal. The courts below, in concurrent findings, resolved these questions of fact against petitioner (R. 928-944, 977). These findings of fact were amply sustained by the evidence and the conclusions of law (R. 944-6, 977-8) inevitably followed under well established principles of admiralty jurisprudence.

The Cause Below

Libelant-respondent was the owner of 1847 cases, and 20 bundles of four cases each, of lily of the valley pips which were in good healthy state when dug and packed in Germany in October-November 1939 (Findings 2 and 6, R. 929). These pips were dormant (Finding 37, R. 938) and arrangements had been made to ship them under refrigeration from Rotterdam to New York on a vessel of the Holland-American Line, but that Line cancelled the booking under threat of a British embargo because of German origin of the shipment (Finding 7, R. 930). There being no refrigerated space available, libelant wished to obtain the next coolest place of stowage—namely on the foredeck of a vessel covered by tarpaulins to protect them from sea water (Opinion, R. 919). It, therefore, booked space for the pips on the forward deck of the *Lafcomo* through petitioner, the charterer-operator of the vessel, and stipulated that they be covered with tarpaulins (Findings 10, 14, 14, R. 930-1). The petitioner accepted the shipment

but failed to cover the pips with tarpaulins since neither it nor the ship had spare tarpaulins available (Findings 18, 19, 20, R. 932-3). The pips were in good order on delivery to the vessel (Finding 16, R. 932).

The pips were stowed by petitioner's stevedores under supervision of the Captain (Finding 23, R. 933) on the deck plating of the foredeck of the ship (Finding 24, R. 934), where they obstructed the run-off of sea water through mooring rings, freeing ports and scuppers in the bulwarks (Findings 28, 29, 30, R. 936-7) rather than on the hatch covers where they would have been above the water on deck and would have allowed the sea to drain off through such openings (Finding 35, R. 938). The ship experienced such weather as was to be expected on an ordinary North Atlantic voyage in November-December with strong westerly winds and fresh gales, resulting in much sea water coming aboard (Finding 33, R. 937) which thoroughly soaked the cases of pips so that their contents were found to be ruined and a total loss commercially on arrival at New York (Findings 38, 47-54 inc., R. 939-943). On the basis of these findings the District Court found that petitioner and the ship's officers were negligent in such stowage of the pips and that the ship was unseaworthy *quoad* such stowage (Conclusions VI, VII, R. 945) and held both petitioner and the shipowner jointly and severally liable to libelant-respondent. It concluded, however, that, as between the shipowner (claimant-respondent) and petitioner the shipowner should recover from petitioner any amount which it might "be required to pay in satisfaction of libelant-respondent's claim herein" (Conclusions IX, X, R. 946) because petitioner had falsely represented to the ship's captain that the pips were not to be covered with tarpaulins (Finding 60, R. 944). The findings of fact of the District Judge fully substantiated his clear and well-reasoned opinion (R. 918-928).

Upon appeal the Circuit Court of Appeals, opinion by Clark, C. J., affirmed the judgment of the District Court

in all respects with costs (R. 976-8) in an opinion from which I quote as follows:

> "The well-reasoned opinion of Leibell, J., below, 49 F. Supp. 559, leaves little for us to add. There is ample evidence to sustain his findings. Upon the finding that there was no agreement by the shipper that the deck cargo need not be covered, the vessel is liable, as well as the common carrier. Salt water is obviously harmful to plant life, and the finding of negligence in stowage was justified. The shipper accepted the risk of losses from carriage on deck only so far as they occurred under proper stowage. See Hough, J., in *The Royal Sceptre*, D. C. S. D. N. Y., 187 F. 224, 228; *Compania de Navigacion La Flecha* v. *Brauer*, 168 U. S. 104, 123, 124, 18 S. Ct. 12, 42 L. Ed. 398. The ship was thus unseaworthy in respect to its carriage. *The J. L. Luckenbach*, 2 Cir., 65 F. 2d 570, 572; *The Thomas P. Beal*, 3 Cir., 11 F. 2d 49. Both respondent and the vessel are therefore liable; the maritime lien against the ship for safe carriage obtains whether or not it was under charter. *The Maggie Hammond*, 9 Wall. 435, 449, 450, 76 U. S. 435, 19 L. Ed. 772; *Taylor Bros. Lumber Co.* v. *Sunset Lighterage Co.*, 2 Cir., 43 F. 2d 700, 701; *The Esrom*, 2 Cir., 272 F. 266, 271, certiorari denied 257 U. S. 634, 42 S. Ct. 47, 66 L. Ed. 408. Libellant was not in fault and there is no basis for application of the rule of divided damages in tort. Respondent has not been able to prove what the damage would have been if proper stowage had been made. See *Schnell* v. *The Vallescura*, 293 U. S. 296, 307, 55 S. Ct. 194, 79 L. Ed. 373. And since, as the court found, libellant's demand for tarpaulin coverage was never withdrawn, the statement of respondent's agents to the 'Lafcomo's' captain to the effect that tarpaulins were not needed was a gross misrepresentation of fact, and respondent should therefore be held for the entire damage as against the claimant. *Canadian Transport Co.* v. *Court Line, Ltd.*, [1940] A. C. 934" (R. 977-8).

Argument

Petitioner puts forward ten alleged reasons for granting the writ (Petition 14-16) and the nine points of its argument (Brief 19-43) follow the same outline. Each Roman numbered point corresponds to the respective Arabic numbered reason except that Point IV covers two reasons (Nos. 4 and 5) as also does Point VIII (reasons Nos. 9 and 10) while Point IX deals with new matter (general interest and unusual importance of questions presented) not dealt with in the reasons assigned in the petition. This results in Points V, VI and VII covering Reasons 6, 7 and 8, respectively.

In answering petitioner's argument I shall follow the condensation made in its nine points. Of these nine points, I, II and III deal solely with the dispute between petitioner and claimant-respondent, the answer to which I leave to counsel for claimant-respondent, limiting my argument to petitioner's Points IV to IX, inclusive.

POINT I

The courts below were clearly right in holding that libelant-respondent did not assume the risk of damage to its cargo through wetting by sea water shipped by the vessel and their decisions are not in conflict with *Lawrence* v. *Minturn* and *The Delaware*.

(Answering Petitioner's Point IV, Brief pp. 31-4.)

Petitioner's position is that libelant-respondent assumed all risk of its deck cargo being wetted by salt water because it agreed to stowage on deck, even though such wetting was due to petitioner's failure to cover the cargo with tarpaulins as it had agreed and to its negligence in stowing the cargo

on the deck plates where it obstructed the openings in the bulwarks, thus causing the water shipped on board to back up and immerse the uncovered cargo, instead of stowing it on the tops of the hatches (3 feet above the deck plates) where the water would have an unimpeded run-off to the sea. To state the position is to refute it. By agreeing to carriage of its cargo on deck libelant-respondent did not relieve petitioner from liability for loss of, or injury to, such cargo caused by petitioner's failure reasonably to protect it from salt water.

Both courts below concurred in finding that petitioner failed to fulfill its agreement to cover the pips with tarpaulins, and that the stowage was negligent and the ship unseaworthy with respect thereto. See Points IV and V, infra, pp. 12-18.

As this Court held in *Compania de Navigacion La Flecha* v. *Brauer*, 168 U. S. 104:

> "The words 'on deck at owner's risk' cannot have been intended by the parties to cover risks from all causes whatsoever, including negligent or wilful acts of the master and crew. To give so broad an interpretation to words of exception, inserted by the carrier and for his benefit, would be contrary to settled rules of construction, and would render nugatory many of the subsequent stipulations of the bill of lading" (pp. 123-4).

And see *The Royal Sceptre*, 187 F. 224, where Judge Hough, a very experienced admiralty judge, held:

> "Deck cargo at shipper's risk does not mean such absolute surrender of all rights. The risk assumed presupposes proper loading for deck stowage and a seaworthy ship. It is not thought that Lawrence v. Minturn asserts any doctrine opposed to this" (p. 228).

The Circuit Court of Appeals below, citing these decisions, affirmed the conclusion of the District Court that the

"shipped on deck at shipper's risk" provision in the bill of lading did not relieve the carrier or ship "for improper care and stowage" (Conclusion IV, R. 945), holding that:

> "The shipper accepted the risk of losses from carriage on deck only so far as they occurred under proper stowage" (R. 977).

The decisions cited by petitioner are not to the contrary. In the *Carriso* (C. C. A. 9) 30 F. (2d) 279, the contention was that stowage on deck constituted negligence *per se*, and not that "the consignments here were improperly loaded or stowed" (p. 280).

In *Lawrence* v. *Minturn*, 17 How. 100, the Court expressly found that the stowage was good, saying:

> "As to the argument, that there was negligence in not properly stowing and supporting this burden on deck, we think it is not made out in proof. The master is bound to use due diligence and skill in stowing and staying the cargo; but there is no absolute warranty that what is done shall prove sufficient. We are of opinion that due diligence and skill were used" (p. 115).

Petitioner at the bottom of page 33 of its brief gives an entirely wrong impression of the holding of this Court in *The Delaware*, 14 Wall. 579, by quoting only a part of the last sentence and indicating the omission by asterisks. The complete sentence, emphasizing the words omitted by petitioner, reads as follows:

> "No such consequences, however, follow if the goods were stowed on deck by the consent of the shipper, as in that event neither the master nor the owner is liable for any damage done to the goods by the perils of the sea or from the necessary exposure of the property, *but the burden to prove such consent is upon the carrier, and he must take care that he has competent evidence to prove the fact*" (p. 605).

In the court below the petitioner failed to prove that libelant-respondent consented to stowage of the cargo on

deck without coverage by tarpaulins. On the contrary, both courts concurred in finding that the agreement provided for stowage on the foredeck covered by tarpaulins, that the goods were not covered by tarpaulins and that the stowage was negligent and the ship unseaworthy in respect thereto (R. 977).

The decision below, in the respect referred to, is in complete accord with the decision of this Court in *Compania de Navigacion La Flecha* v. *Brauer,* 168 U. S. 104, and is not in conflict with the earlier decisions in *Lawrence* v. *Minturn,* 17 How. 100, and *The Delaware,* 14 Wall. 579.

POINT II

The libelant-respondent was not in fault in requiring stowage on deck covered with tarpaulins; the fault was entirely that of petitioner in failing to provide tarpaulin coverage and in not stowing the pips on the hatch covers where they would have been above the water on deck, and there is no basis for application of the rule of divided damages in tort.

(Answering Petitioner's Point V, pp. 34-5.)

The point that libelant-respondent should be allowed only divided damages because it booked stowage on deck was raised below as well as the point that it had assumed all risk by booking such stowage (answered in Point I) and both points were overruled (R. 978). The rule of divided damages in admiralty only applies to torts (*The Max Morris,* 137 U. S. 1, 15) and not to contracts. It should not be extended to a contract of carriage between a shipper and a common carrier where the shipper has not been negligent. That the cause of action was one of cargo damage arising out of the breach of petitioner's contract with libelant-respondent properly to stow the pips on deck covered with tarpaulins is shown by the pleadings. (See

Articles Second to Seventh, inclusive, of the libel, Record 6-8, and especially Articles Fourth and Fifth, Tenth to Fifteenth, inclusive, and Twentieth and Twenty-first of petitioner's answer pleading the terms of the bill of lading, Record 11-16; see also Articles Fourth and Fifth, Tenth to Fifteenth, inclusive, Eighteenth, Twentieth and Twenty-first of claimant-respondent's answer, Record 18-24). Any allegations of negligence contained in the libel arise out of the failure of the petitioner to perform the obligations of its contract as a common carrier for hire. Moreover, the most seriously disputed issue of fact below was "whether libelant's original demand for the covering of the pips with tarpaulins" (R. 977) referred purely to the question of the terms of the contract between the petitioner and libelant-respondent. See *The St. Paul,* (S. D. N. Y.) 277 F. 99, where the Court held at page 109 that a libel in cargo damage sounds in contract and not in tort.

The cases cited by petitioner as authority for its position, *The Georgian,* 4 F. Supp. 718, affirmed 76 F. (2d) 550 (C. C. A. 5), and *Snow et al.* v. *Carruth et al.,* 22 Fed. Cas. 724, No. 13144, are not in point since in each of them the injury to the goods was attributed both to inherent vice upon shipment and to negligence in care and custody by the carrier. In the cause at bar the total injury was caused by negligent care and custody by petitioner and the ship. The District Court found that the pips were in good order and condition on delivery to the *S.S. Lafcomo* (Finding 16, R. 932) and became a total loss by sea water damage due to negligence of petitioner and unseaworthiness of the ship (Finding 54, Conclusions VI and VIII, R. 943-6), while the Circuit Court of Appeals concurred, saying:

> "Libellant was not in fault and there is no basis for the application of the rule of divided damages in tort. Respondent has not been able to prove what the damage would have been if proper stowage had been made. See *Schnell* v. *The Vallescura,* 293 U. S. 296, 307" (R. 978).

Schnell v. *The Vallescura,* supra, clearly overrules the doctrine for which *The Georgian,* supra, and *Snow* v. *Carruth,* supra, are cited by petitioner, for it holds that where cargo damage is found to be due both to sea peril and negligence in ventilation, the carrier is liable for the entire damage if it is unable to show what portion of the loss was due to sea peril for which it is not liable, as distinguished from negligence in ventilation, for which it is liable.

POINT III

The agreement of petitioner with libelant-respondent to stow the pips on the foredeck and cover them with tarpaulins was not merged in the bill of lading in which coverage by tarpaulins was not mentioned.

(Answering Petitioner's Point VI)

The District Court below found that the bill of lading (R. 878) was prepared by libelant-respondent's agents at Rotterdam except for the stamped clauses thereon and was signed by petitioner's Rotterdam agent, under date of November 26th (Finding 26, R. 934-5). There is nothing in the record to substantiate petitioner's statement (brief, p. 38) that it was prepared by libelant-respondent's agents "on Sunday, November 26th", after the loading permit was prepared, from which petitioner argues that it was a revocation of the "demand for tarpaulins" contained in such permit. There is no evidence concerning the time when the bill of lading, was prepared by libelant-respondent; petitioner's counsel's proposed finding, submitted to the District Judge as to such time, was disallowed.

It seems probable that the bill of lading was presented contemporaneously with the written shipping order or loading permit to petitioner's stevedores by libelant-respondent's agent at approximately 5:30 P. M. on November 25th,

when the pips were delivered to the ship. This written shipping order or loading permit contained words in the Dutch language which were translated as meaning "to be loaded on deck on the foredeck to be covered" and libelant-respondent's representative made out a so-called duplicate thereof at the stevedores' request which contained words in the Dutch language which were translated "these parcels loaded together on *Lafcomo* foredeck *under tarpaulins*" with the emphasized words underlined in blue (R. 635-6) and both documents were accepted by petitioner's stevedores without alteration or objection at the time (Finding 14, R. 931). It would be normal and usual practice for these documents to have been delivered contemporaneously with the bill of lading. That they were so delivered is indicated by the fact that the goods were loaded on ship on Sunday, November 26th; that libelant-respondent's forwarding agent telephoned the stevedores on that day to inquire if they were being loaded (Finding 22, R. 933), but that no representative of libelant-respondent was on board the *Lafcomo* during or after the stowage of the goods (Finding 32, R. 937). Had the bill of lading been delivered by libelant-respondent's representative on November 26th, why would he not have gone aboard the vessel at the time to see the stowage instead of telephoning to ascertain about the loading?

The District Court found that "the proper place for any such notation" [coverage by tarpaulins] "was on the loading permit" (Finding 26, R. 934-5).

The cases cited by petitioner are not in point. No other document besides the bill of lading was involved in *The Delaware*, 14 Wall. 579, while in *The Thames*, 14 Wall. 98, the question was whether the original bill of lading in the hands of the shipper or the ship's copy thereof controlled. The cause below did not involve any attempt to contradict or vary a written contract. There were two written documents, the loading permit or shipping order and the bill of lading. They did not contradict each other since both

provided for stowage on deck. They supplemented each other. The loading permit merely detailed the type of protection to be afforded the goods when so stowed, by tarpaulin coverage. The Courts below were right in reading the two documents together in determining the contract between the parties.

POINT IV

The evidence supports the findings of the courts below that petitioner agreed with libelant-respondent to cover the goods with tarpaulins.

(Answering Petitioner's Point VII, pp. 37-8.)

The District Court found that about midday on November 25, 1939, libelant-respondent's forwarding agents booked space on the foredeck of the vessel from petitioner's agents "giving instructions that the shipment should be covered with tarpaulins, and these instructions were never changed or countermanded" (Finding 12, R. 930-1); that on the afternoon of November 25th after so booking the space libelant-respondent's said agent prepared a written shipping order which provided that such shipment was to be loaded on the foredeck, to be covered, which document was delivered to petitioner's stevedores at about 5:30 P. M., with a duplicate made out at stevedores' request, at the time the goods were delivered and were received without question and without change (Finding 14, R. 931); that the ship had on board insufficient tarpaulins to cover the goods and that neither petitioner nor its Rotterdam agents had sufficient tarpaulins for the purpose and had such coverage been given would have been required to buy or rent them (Finding 18, R. 932-3); that after receiving the goods, with the shipping order or loading permit providing for coverage on deck, petitioner's stevedore telephoned petitioner's agents to inquire whether

he should order tarpaulins because the next day was Sunday, and was told by petitioner's agent it "was not necessary as they 'had not to be covered'" (Finding 19, R. 933); that on the evening of November 25th after the stevedores had received the goods with the aforesaid loading permit petitioner's Rotterdam agent instructed the stevedore foreman "not to cover the shipment with tarpaulins" (Finding 20, R. 933).

See also Opinion of District Court (R. 918-928, especially at fols. 2757-60 and fols. 2772-5).

The Circuit Court of Appeals concurred in the findings of the District Court, saying:

> "The district court, however, resolved the most seriously disputed issue of fact—whether libelant's original demand for the covering of the pips with tarpaulins were withdrawn—in favor of libelant, and found negligence in the stowage because the boxes of pips were not covered by tarpaulins and because they were placed in the wings of the hatches, rather than on the hatch covers, where they would have been above the water on deck and would have allowed the sea to drain off through freeing ports, moorings and scuppers. * * * The well reasoned opinion of Leibell, J., below, 49 F. Supp. 559, leaves little for us to add. There is ample evidence to sustain his findings" (977).

In view of the many cases holding that it is "the settled doctrine of this Court that concurrent decisions of the Courts below upon a question of fact will be followed unless shown to be clearly erroneous" (*Compania La Flecha* v. *Brauer,* 168 U. S. 1, and cases there cited: *Stuart* v. *Hayden,* 169 U. S. 114; *Baker* v. *Cummings,* 169 U. S. 189; *The Carib Prince,* 170 U. S. 655; *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.,* 181 U. S. 218; *The Wildcroft,* 201 U. S. 378) and as petitioner has not pointed out any clear error it seems unnecessary for me to go further and cite testimony to sustain the findings below. *Electric Storage Battery Co.* v. *Shimadzu,* 307 U. S. 5, cited by petitioner as holding to the contrary

(p. 37) in fact is to the same effect for the report states at page 9, "No controversy of fact is involved as the petitioner concedes it must accept the concurrent findings of the Courts below."

It may also be observed that the following undisputed facts made the concurrent findings almost inevitable. Petitioner admitted that libelant-respondent's forwarding agent originally orally reserved space for the goods "to be stowed on deck of the *S.S. Lafcomo* on the foreship covered by tarpaulins * * * " (R 693-4) but claims it later countermanded the instructions for tarpaulin coverage. Libelant-respondent's agent denied that he countermanded such instructions (R. 623) and his testimony was corroborated by the written shipping order or loading permit, expressly providing for such coverage, which was prepared under his direction two or three hours after the conversation with petitioner's representative (Ex. 1, R. 722; Ex. A, R. 896). This document was delivered by hand to petitioner's stevedores with other cargo documents along with the pips in the late afternoon of November 25th (R. 735, 750) and was accepted by them without question, objection or alteration and in fact they requested the bearer thereof to make out a duplicate, which he did, on which he underlined in blue pencil the words "under tarpaulins" (R. 635-6); that these documents were turned over by petitioner's stevedores to petitioner's Rotterdam agents two days after the vessel sailed (R. 705) and were never questioned until after the suit herein was brought. No protest was ever made by petitioner's stevedores or agents after receiving this written shipping order or loading permit. It is inconceivable that, if petitioner's story of the alleged countermanding of the instructions for tarpaulin coverage were true, it would have accepted the loading permit and allowed it to remain unchallenged, without even writing a letter to respondent's agent or making a notation on the document to evidence the alleged countermanding.

POINT V

The evidence supports the findings below that the stowage was negligent and was the proximate cause of the loss and the case falls within the rule of *Schnell* v. *The Vallescura.*

(Answering Petitioner's Point VIII, pp. 39-40.)

All except one of the experts on stowage for all parties to the cause testified in open Court. The facts as to the actual stowage are undisputed. The District Court made the following findings as to stowage:

The pips were stowed on the forward well deck on the deck plates on both sides of No. 1 and 2 hatches and were not covered with tarpaulins (Findings 24, 25, R. 934); No. 1 hatch was 27 feet long and 24 feet wide and No. 2 hatch 31 feet long and 24 feet wide and their coamings were about 3 feet high (Finding 27, R. 935-6); the bulwarks which were 3½ feet high on each side of the forward well deck were provided with the following openings for drainage of water: 2 oval mooring rings each 15 inches long and 7 inches high, the bottom of each being 15 inches above the deck plate, 4 oval freeing ports each 3 feet long and 20 inches high, the bottom of each being 14 inches above the deck plates, 3 scuppers each 6 inches long and 2½ inches high and 2 scuppers 6 inches long and 4 inches high, the bottom of each scupper being about ½ inch above the deck plates and 2 vertical scuppers near the after corners of the forward well deck having a diameter of 1½-2 inches (Finding 28, R. 936); that the cases of pips so stowed blocked off and obstructed two of the four freeing ports, both of the mooring rings and part of the scuppers in each bulwark which resulted in the lower tiers of the stow being submerged in sea water for considerable periods during the voyage (Finding 30, R. 936-7); that the vessel met such weather as was to be expected on her voyage from Rotterdam to

New York with much water coming aboard on the forward well deck (Finding 33, R. 937-8); that the pips could have all been stowed on top of Nos. 1 and 2 hatches in piles 6½ to 6¾ feet high without danger to the ship's stability, covered with three tarpaulins to each hatch and lashed so that the cases would have been free from submersion by the water flooding the foredeck plating and the contents protected from damage (Finding 35, R. 938); that vegetable and plant cargoes are customarily stowed on the tops of hatches and not on deck plates when carried on the foredeck (Finding 36, R. 938); that the pips were dormant when shipped and would not have heated or sprouted if covered with tarpaulins on the voyage (Finding 37, R. 938-9); that the pips upon arrival at New York were a total loss and such loss was caused by sea water damage (Finding 54, R. 943); that the stowage of the pips on the vessel constituted negligence and the ship was unseaworthy with respect thereto (Conclusions VI and VII, R. 945); that the competent producing cause of the damage to the pips by sea water was the failure to stow them on top of Nos. 1 and 2 hatches covered by tarpaulins (Conclusion VIII, R. 945-6).

The Circuit Court of Appeals concurred in these findings as I have heretofore shown at page 13.

There was ample evidence to support these findings. The testimony of the experts, Captain Lynner and Captain Claridge, fully supported the finding that stowage on the deck plates was not customary or in accordance with good practice and that the cargo could have been stowed on the hatch covers where it would have been adequately protected (Lynner, R. 235-6, 239-40, 253-4, 258-60, 267-72, 274, 528, 538; Claridge, R. 828-9, 843-4, 865-6).

Petitioner's expert witnesses recognized the fact that the cargo would get very wet stowed on the foredeck plating (R. 387, 393-8, 443-4, 453, 455, 471). Petitioner's only objection to stowage on the hatch covers was because of alleged difficulty in lashing the tarpaulins, but admitted that this could have been done (R. 349, 380, 382) and that

unless the tarpaulins became torn the cargo would have been protected (R. 354, 388-9). Captain Pilcher, one of the petitioner's experts, admitted that, with tarpaulins arranged as Captain Lynner advised, the cargo would be protected from any seas coming from forward or from any direction except abaft the beam.

Captain Cocks, petitioner's expert, conceded upon questioning by the Court that if the cargo had been stowed on the hatches instead of on the deck plates the water would have run off much more easily and the cargo would have been above the water. I quote from his testimony as follows:

> "Q. How high is the hatch cover above the deck? A. Three feet.
>
> Q. And how high is the freeing port, the lower part of it? A. About 15 inches.
>
> Q. Now if the cargo was stowed on the hatch top, then a heavy wave or any great quantity of water on the deck would reach the height of the freeing port before it reached the height of the hatch cover, wouldn't it? A. Yes, sir.
>
> Q. And if the cargo was stowed on the hatch cover you would have the whole side—you would have both sides of the well-deck free for the runoff of the water through the mooring rings, through the freeing ports and through the scuppers, isn't that right? A. Yes, sir.
>
> Q. And it would make a clear, wide and satisfactory passage or runoff for the water, wouldn't it? A. It would be to the open deck.
>
> Q. An open deck on either side? A. Yes, sir.
>
> Q. And wouldn't the water under those conditions run off and be returned to the ocean much more readily and rapidly than with the cargo stowed as it was as shown on the model? A. Yes, sir" (R. 398-9).

The finding that the pips were dormant, did not need ventilation and would not have sprouted if covered by tarpaulins was based upon the testimony of Dr. Zimmerman, distinguished plant physiologist of the Boyce Thompson

Institute (R. 220, 222-3). The instances of sprouting testified to by petitioner's witnesses were all of pips carried unrefrigerated under deck, not on deck (R. 476, 503, 510).

The findings that plant and vegetable cargo is customarily carried stowed on hatch covers covered with tarpaulins were based on numerous instances testified to by Captain Lynner and Captain Claridge, the former of whom produced records of eighteen survey reports from his office showing such stowage coming through heavy weather around Hatteras without damage (R. 234-9, 528-36, 550-1). Lynner testified that in not more than one trip in 500 is a tarpaulin torn away by the seas (R. 539).

The findings are clearly supported by the evidence.

Schnell v. *The Vallescura*, 293 U. S. 296, clearly applies, as I have shown supra, page 10. The Carriage of Goods by Sea Act, 46 U. S. C. 1300, does not apply to deck cargo which is governed by the Harter Act, 46 U. S. C. 190-5, under which *Schnell* v. *The Vallescura* was decided.

POINT VI

The questions presented are not of general interest and unusual importance. The cause is merely an ordinary cargo damage suit such as is met with almost daily in the district courts and was decided below in accordance with well-established principles of admiralty law. It has no unusual importance except in the eyes of petitioner's counsel.

FINAL POINT

The petition for writ of certiorari should be denied.

January 22, 1944.

Respectfully submitted,

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